ERIC W. BURTON #F02720
NAME
F02720
PRISON NUMBER
CSATF/SP-C1-119L
CURRENT ADDRESS OR PLACE OF CONFINEMENT
CORCORAN, CA. 93212
CITY, STATE, ZIP CODE
IN PRO PER

NUNC PRO TUNC
JUN 18 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE
ERIC W. BURTON
ON FEDERAL HABEAS
CORPUS

ERIC WILTON BURTON,
(FULL NAME OF PETITIONER)
PETITIONER

v.

DIRECTOR OF THE C.D.C.R.,
(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS])
RESPONDENT

and

_____,
The Attorney General of the State of California, Additional Respondent.

Civil No 08CV0325 LAB(POR)
(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

PURSUANT TO FOMAN V. DAVIS 371 U.S. 178, 182 (1962); 15(A), 19(A) FED. R. CV. P.

FIRST AMENDED
PETITION FOR WRIT OF HABEAS CORPUS

SCHUP V. DELO (1995) 513 US 298
NEWLY DISCOVERED EVIDENCE
28 U.S.C.S 2244(b)

UNDER 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY

BASED ON THE ATTACHED MEMORANDUM AND POINTS OF AUTHORITIES REQUEST FOR AN EVIDENTIARY HEARING. NOTICE AND MOTION FOR APPOINTMENT OF COUNSEL

1. Name and location of the court that entered the judgment of conviction under attack: EL CAJON SUPERIOR COURT
2. Date of judgment of conviction: 7-29-05
3. Trial court case number of the judgment of conviction being challenged: SCE238643
4. Length of sentence: LIFE + 25 YEARS TO LIFE

CIV 68 (Rev. Jan. 2006)

5. Sentence start date and projected release date: _____

6. Offense(s) for which you were convicted or pleaded guilty (all counts): _____

7. What was your plea? (CHECK ONE)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐

8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)
   (a) Jury ☒
   (b) Judge only ☐

9. Did you testify at the trial?
   ☐ Yes ☒ No DENIED RIGHT TO TESTIFY, WITHOUT PRIOR NOTICE INVESTIGATING OFFICER WAS NEGLIGENTLY UNAVAILABLE SEE R.T. 978, LINES 2-15, 17-24 DIRECT APPEAL

10. Did you appeal from the judgment of conviction in the **California Court of Appeal**?
    ☒ Yes ☐ No

11. If you appealed in the **California Court of Appeal**, answer the following:
    (a) Result: DENIED PETITION FOR REHEARING - FILED 7-11-07
    (b) Date of result (if known): 8 7-18-07
    (c) Case number and citation (if known): S152584 - BURTON (ERIC) ON H.C.
    (d) Names of Judges participating in case (if known) COURT ADMINISTRATOR AND CLERK OF THE SUPREME COURT FREDERICK K. OHLRICH
    (e) Grounds raised on direct appeal: DENIAL OF RIGHT TO SELF REPRESENTATION FARETTA; BATSON ERROR; ABSCENCE OF COUNSEL; IAC REFUSING TO GIVE JURY INSTRUCTION ON SELF DEFENSE, ADMITTING CERTAIN EVIDENCE (352) SEE FARETTA V. CALIFORNIA (1975) 422 U.S. 806, (FARETTA

12. If you sought further direct review of the decision on appeal by the **California Supreme Court** (e.g., a Petition for Review), please answer the following:
    (a) Result: AFFIRMED
    (b) Date of result (if known): 4-25-07
    (c) Case number and citation (if known): D047617/D049846 (H.C.) PROPER - PETITIONER COLLATERAL ATTACK
    (d) Grounds raised: _____

13. If you filed a petition for certiorari in the **United States Supreme Court**, please answer the following with respect to that petition:

(a) Result: _____

(b) Date of result (if known): _____

(c) Case number and citation (if known): _____

_____

(d) Grounds raised: _____

_____

_____

_____

COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Superior Court**?

☒ Yes ☐ No

15. If your answer to #14 was "Yes," give the following information:

(a) **California Superior Court** Case Number (if known): E.C. SUPERIOR (TRIAL COURT)

(b) Nature of proceeding: STATE H.C. PROPER

_____

(c) Grounds raised: PROSECUTORIAL PERJURY / IAC

_____

_____

_____

(d) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☒ No

(e) Result: DENIED

(f) Date of result (if known): _____

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Court of Appeal**?

☒ Yes ☐ No

17. If your answer to #16 was "Yes," give the following information: (4TH DISTRICT DIV I

(a) **California Court of Appeal** Case Number (if known): D049846 PRO PER

(b) Nature of proceeding: STATE COLLATERAL H.C. WITH DIRECT APPEAL

(c) Names of Judges participating in case (if known) STEPHEN M. KELLY CLERK, JUDGES, McDONALD, J. HALLER ACTING P.J. IRION, J. CONCURRING

(d) Grounds raised: IAC, ABSENCE OF TRIAL COUNSEL SLEEPING AT 1538.5. ABSENT AT TRIAL SEATED WITH JURY SEE JAVOR V. U.S. 470 U.S. 505 MCLEOD V. PARK

(e) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☑ No

(f) Result: DENIED

(g) Date of result (if known): 4-25-07

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Supreme Court**?
☑ Yes ☐ No

19. If your answer to #18 was "Yes," give the following information:

(a) **California Supreme Court** Case Number (if known): S152584

(b) Nature of proceeding: FEDERALIZED H.C. PETITION FOR REVIEW TO EXHAUST STATE COURT REMEDIES ON IT'S FACE

(c) Grounds raised: BATSON ERROR, FARETTA, FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSES VIOLATION PROSECUTION SUPPRESSION OF EVIDENCE LOSS AND DESTRUCTION AND MANY MORE NOT ABLE TO RECALL AT THIS PRESENT TIME LEGAL WORK LOST BY STAFF

(d) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☑ No

(e) Result: REVIEW DENIED 6-11-07 FILED TIMELY ON 5-11-07

(f) Date of result (if known): 6-11-07, PETITION FOR REVIEW DENIED 7-18-07

20. If you did ***not*** file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the **California Supreme Court**, containing the grounds raised in this federal Petition, explain briefly why you did not:

_____

_____

_____

_____

COLLATERAL REVIEW IN FEDERAL COURT

21. Is this your **first** federal petition for writ of habeas corpus challenging this conviction?

☐ Yes ☑ No (IF "YES" SKIP TO #22)

(a) If no, in what federal court was the prior action filed? _____

(i) What was the prior case number? _____

(ii) Was the prior action (CHECK ONE):

☐ Denied on the merits?

☑ Dismissed for procedural reasons?

(iii) Date of decision: ON OR ABOUT 8/10CP (LAB) SO. DIST CA.

(b) Were any of the issues in this current petition also raised in the prior federal petition?

☐ Yes ☑ No

(c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition?

☐ Yes ☐ No

CAUTION:

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present ***all*** other grounds to the California Supreme Court before raising them in your federal Petition.
- **Single Petition:** If you fail to set forth all grounds in this Petition challenging a specific judgment, you may be barred from presenting additional grounds challenging the same judgment at a later date.
- **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.

GROUNDS FOR RELIEF

22. **State *concisely* every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize *briefly* the facts supporting each ground.** (e.g. what happened during the state proceedings that you contend resulted in a violation of the constitution, law or treaties of the United States.) If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

SEE R.T. 0001-0023, R.T. 0028-0029, R.T. 0032 LINES 1-20 23-26 R.T. 0033, LINES 1,4,-22, R.T. 0067-0069, R.T. 0073.

(a) **GROUND ONE**: DENIAL OF 6TH & 14TH FEDERALLY GUARANTEED RIGHT TO (SEE R.T. 797) SELF REPRESENTATION, FAILURE TO RULE ON FUNDAMENTALLY SEPARATELY RECOGNIZED TIMELY INVOKED 6TH AMENDT MOTION. SEE R.T. 0364 (7-19-05 10:57 AM)

LINES 1-11

SEE R.T. 0142, R.T. 21 LINES 1-25, R.T. 417, 457

Supporting FACTS: ON 16 MARCH 05, TIMELY DEFENDANT INVOKED HIS 6TH AMEND U.S. CONST. RIGHT TO SELF REPRESENTATION AND ALSO REQUESTED A MARSDEN TO RELIEVE COUNSEL KNOWINGLY AND INTELLIGENTLY. PETITIONER AROFFERED TWO FUNDAMENTALLY (SEE ALSO R.T. 0121) (SEE R.T. 0123) SEPARATE MOTIONS THAT COURT RECOGNIZED, SEE R.T. 167, LINES 26-28. R.T MINUTES (3-16-05) 0348, 0349, 0350, 0351 R.T 168, LINES 1-14, R.T. 182, LINES 7-9, R.T. 183, LINES 19-21, 24-28, R.T 184 LINES 1-4, 8, R.T. 185, LINES 8, 9, 15, 16, 18-23, R.T. 186, LINES 3-6, 12, 14, 16, 18, 19, 23-28, R.T. 187, LINES 1-21, R.T. 188, LINES 9-15, 17, 19, 22-28, R.T. 189, LINES 5, 1-6, 10, 11, 13-16, 18, 19, 22-28, R.T. 190, LINES 2, 4-6, 10, 11, 13, R.T. 191, LINES 1, 2, 3, 21-25, 27, R.T. 196, LINES 4-8, 17-20, 22, 23, 25, 28 R.T 198 LINES 2, 3, 5, 11, 13, 15, 16, 17, 21, 23-24, 28. R.T 199 LINES 4, 5, 11, 12, 13, 24-28. R.T 200, LINES 1-7, 11, 12, 13, 17, 19-21, 25-28. R.T. 204, LINES 1-8, 10, 12, 17-20, 22, 24, 25, 27, 28, R.T. 210, LINES 5, 1-19, 22-26 R.T. 211, LINES 1-5, 18, R.T. 205, LINES 1-28, R.T. 211, LINES 23-28, R.T. 212, LINES 8, 15, 17-21, 23-28, R.T. 213, LINES 1-10, 13, 16-23, 25-28. R.T. 214, LINES 1-6, 9, 10, 22-26 R.T. 215 LINES 2-6, 8, 9, 12-16, 19-28. R.T. 216, LINES 1, 2, 14-18, 20, 21 R.T. 217, LINES 4-28, R.T. 218 LINES 1-3, R.T. 313, LINES 1-28.

Did you raise GROUND ONE in the California Supreme Court?

☒ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): H.C. PETITION FEDERALIZED

(2) Case number or citation: S152584 - ON PETITION FOR REVIEW

(3) Result (attach a copy of the court's opinion or order if available): DENIED REVIEW

(b) GROUND TWO: FAILURE TO RULE ON PETITIONERS TIMELY FILED MOTION 2 WEEKS PRIOR TO TRIAL ON 07-07-05, AND 27 MAY 05, SEE FARETTA V. CALIFORNIA 422 U.S AT. P. 836 [95 S CT. AT. P 2541] (1975)

Supporting FACTS: ON OR ABOUT 07 JULY 05, PETITIONER (SEE R.T. 1245, LINES 18-24) PURSUANT TO 28 U.S.C. § 1746, FILED A TIMELY FARETTA PRO SE, MOTION, MOTION FOR DISMISSAL OF DUE PROCESS VIOLATIONS, COURT REFUSED TO EXERCISE DISCRETION AND RULE, IN ADDITION PRIOR TO TRIAL ON 01 JUNE 05 PETITIONER FILED WITH THE COURT PURSUANT TO 28 U.S.C. § 1746 A TIMELY FARETTA PRO SE MOTION/995, JUDGE EXHARDS FAILED TO RULE AFTER ACKNOWLEDGEMENT OF HANDWRITTEN MOTION. PROSECUTOR TROCHA WAS PRESENT, JUDGE FAILED TO EXERCISE HIS DISCRETION. AFTER DEFENDANT'S COMPETENCE WAS REINSTATED, SEE, R.T. 313, LINES 1-28, RT. 251, LINES 1-19, 25-28, RT. 252, LINES 5-15, 17-19, 26-28, RT. 253, LINES 1-4, 6, 7, 19-21, 23-26, RT. 235, LINES 1-28, 254, LINES 15, 16, 17, 18, 20, 21, 22, 23, 24, RT. 256, LINES 1-7, 11-16, 22-24, RT. 257, LINES 1, 2, 3, 8-11, 20-27, RT. 258, LINES 7-12, 27, 28, R.T. 1068 RT. 259, LINES 1-7, 21, 22, 27, 28, RT 260, LINES 1-7, 13, 16, 18, 19, 20 21-25, 28, R.T. 264, LINES 1, 7, 8, 9, 15, 16, 17, 20-28, R.T 266, LINES 2-8, 21, 22, 25-28, RT. 267, LINES 1-28, RT. 268 LINES 2, 4, 6-12, 14, 15, 24-28, RT. 269 LINES 1-16, 28, RT. 270, LINES 1-4, 15-19, R.T. 797, LINES 1-11, R.T. 815, 816, 817, 818, LINES 1-17, 20-28 R.T. 819, LINES 1, 5-20, 22-28. R.T. 820, LINES, 1-4, 7-15, 17-24, RT. 822 LINES 18-22, 26-28. R.T 823, LINES 3-6, 8-10, 13, 20-26, 28. R.T. 824 LINES 1-6, 8-11, 18-21, 23, 27. RT 1035, LINES 1-21, 23 RT. 978, LINES 2-15, 17-24, R.T. 1110, LINES, 3-9, 11, 13-17, 19-28, RT 1111, R.T. 1106

Did you raise GROUND TWO in the California Supreme Court?

☑ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): H.C. TO EXHAUST FED.

(2) Case number or citation: S152584

(3) Result (attach a copy of the court's opinion or order if available): REVIEW DENIED.

SEE-CRAWFORD V. WASHINGTON (2004) 541 U.S. 36, 124 S.Ct. 1354

(c) **GROUND THREE**: FAILURE OF PROSECUTION TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE (SUPPRESSION) IN VIOLATION OF FEDERALLY GUARANTEED FOURTEETH U.S. CONST. AMEND. DUE PROCESS + EQUAL PROTECTION CLAUSES -

Supporting FACTS: ON 26 JULY 04, DEFENSE COUNSEL SENT AN INFORMAL LETTER OF DISCOVERY TO D.A. HANNA, ACCORDING TO BOTH COUNSEL PLUMMER AND ADA/R. MS. HANNA NEVER RESPONDED, SEE R.T. 329, PROSECUTIONS (MR. TROCHA) REBUTTAL ON RECORD, RT. 329 LINES, 1-10, 12-23, 25-26, SEE R.T. 326, LINES 8-24, R.T. 328, LINES 1-19, 27, 28. SEE R.T. 172, LINE 28, 173, LINES 1-9, 11, 12 (3-16-05) TIMELY AFTER PROSECUTION FAILED TO RESPOND SEE DEFENDANTS PRETRIAL MOTION TO COMPEL DISCOVERY AND TRIAL JUDGE THAT WAS PREJUDICIAL EYEWITNESS, ON GENUINE COURT BUSINESS RECORDS, AND HER BAILIFF THAT SERVED THOMAS RESTRAINING ORDER IN HER PRESENCE BOTH WERE WITNESSES TO DEFENDANTS FEAR. JANE DOE BAILIFF NEWLY DISCOVERED BY PETITIONER ON GENUINE U.S. MARSHALL PROOF OF SERVICE RECORD DATED 3-4-04. ADDRESS OF PLACED OF SERVICE IS THE COURTHOUSE 250 E. MAIN ST. E.C. CA. 92020 BY S. JONES #1031, PHONE NO. 619 441-3411. SEE POST TRIAL DENIAL FOR DISCOVERY IN EXHIBIT A. DENIED 7-18-07 BY JUDGE SUPERVISOR EXHAROS, NEWLY DISCOVERED BY ERIC W. BURTON #F07220 ON 6-10-08. 28. U.S.C. 2244(b) SEE R.T. 188 LINE 19, 22-24, 27, 28, RT. 189, LINES, 1-6, 13-16, 18, 19, 22-28, RT. 190, LINES 4-6, 10, RT 191, LINES 21-25, RT. 198 LINES 10-13, 15, RT. 199, LINES 4, 5, 8, 9, 11, 12, 13, 24-28. RT. 200, LINES, 11-13, 17, 19-21, 25-28.

Did you raise **GROUND THREE** in the **California Supreme Court**?

☒ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): FOR NEW TRIAL BASED ON SAME GROUND WITHDRAWN/DENIED MOTION ON OR ABOUT 7-1-07 HABEAS PETITION

(2) Case number or citation: S152584

(3) Result (attach a copy of the court's opinion or order if available): REVIEW DENIED

(d) **GROUND FOUR**: BATSON ERROR, DENIAL OF 14TH U.S. FED. GUARANTEED RIGHT TO A JURY OF HIS PEERS. WITHOUT RACE NEUTRAL JUSTIFICATIONS SEE: JOHNSON V. CA. — US. — 2005, CUNNINGHAM V. CA. 75 U.S.L.W. 4078 (U.S. 2007)

Supporting FACTS: DEFENSE COUNSEL MADE A THRESHOLD WHEELER BATSON MOTION AFTER PROSECUTIONS RACIALLY MOTIVATED PEREMPTORY CHALLENGE OF THE SOLE AFRICAN AMERICAN JUROR, AFTER REPEATED UNWARRANTED REFERENCES TO HER RESPONSES ONLY USING HER RELIGIOUS BELIEFS, AND STATING, SHE WOULD NOT MAKE A GOOD JUROR IN GENERAL. PETITIONER IS AFRICAN AMERICAN, HIS FEDERALLY GUARANTEED RIGHT TO A FUNDAMENTALLY FAIR AND IMPARTIAL TRIAL OF A JURY OF HIS PEERS WAS VIOLATED ALONG WITH HIS FOURTEENTH U.S. CONST. AMENDMENT DUE PROCESS AND EQUAL PROTECTION RIGHTS. IN LIGHT OF CUNNINGHAM V. CALIFORNIA, 75 U.S.L.W. 4078, U.S. (2007); MILLER-EL COCKRELL 537 U.S. 322, 71 U.S.L.W. 4095 (2003.); SLACK V. MC DANIAL 529 U.S. 473 (2000); 28 U.S.C. § 2254(d); BATSON V. KENTUCKY 476 U.S. 79 (1986); APPRENDI V. NEW JERSEY 530 U.S. 466 (2000); RING V. ARIZONA 536 U.S. 584, 70 U.S.L.W. 4666 (2002) SEE VOIR DIRE PROCEEDINGS R.T. 150-157 SEE SENTENCING 21 OCT. 05, R.T. 0388, DEFENSE COUNSEL'S OBJECTION TO THE CONSTITUTIONALITY OF THE SENTENCING. RT. 1250 LINES 25-28. RT. 1252, LINES 1-6-28.

Did you raise GROUND FOUR in the California Supreme Court?

☑ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): FED EXHAUST H.C.

(2) Case number or citation: S152584

(3) Result (attach a copy of the court's opinion or order if available): ON OR ABOUT 6-11-07, REHEARING DENIED 7-18-07.

23. Do you have any petition or appeal **now pending** in any court, either state or federal, pertaining to the judgment under attack?
☐ Yes ☑ No

24. If your answer to #23 is "Yes," give the following information:

(a) Name of Court: _____

(b) Case Number: _____

(c) Date action filed: _____

(d) Nature of proceeding: _____

_____

(e) Name(s) of judges (if known): _____

(f) Grounds raised: _____

_____

_____

_____

_____

(g) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☑ No

25. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: ~~IMPROPER - SYLVIA KORN ON DIRECT REVIEW~~ IRA LEE PLUMMER

(b) At arraignment and plea: IRA LEE PLUMMER

(c) At trial: CHARLES ADAIR

(d) At sentencing: CHARLES ADAIR

(e) On appeal: SYLVIA KORN

(f) In any post-conviction proceeding: CA SUPREME COURT JAN 4 2007, S153203, REMITTUR

(g) On appeal from any adverse ruling in a post-conviction proceeding: NO

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
☑ Yes ☐ No UNCHARGED WITHOUT NOTICE & LEGISLATIVE OFFENSE OF A UNDISCLOSED CONVICTED FELON POSSIBLY A KIAH MINCEY - NOT ON WITNESS LIST -

27. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
~~☑ Yes ☐ No~~ LIFE CONSECTIVELY?

(a) If so, give name and location of court that imposed sentence to be served in the future:

_____

(b) Give date and length of the future sentence: _____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
☐ Yes ☐ No

28. Consent to Magistrate Judge Jurisdiction

In order to insure the just, speedy and inexpensive determination of Section 2254 habeas cases filed in this district, the parties may waive their right to proceed before a district judge and consent to magistrate judge jurisdiction. Upon consent of all the parties under 28 U.S.C. § 636(c) to such jurisdiction, the magistrate judge will conduct all proceedings including the entry of final judgment. The parties are free to withhold consent without adverse substantive consequences.

The Court encourages parties to consent to a magistrate judge as it will likely result in an earlier resolution of this matter. If you request that a district judge be designated to decide dispositive matters, a magistrate judge will nevertheless hear and decide all non-dispositive matters and will hear and issue a recommendation to the district judge as to all dispositive matters.

You may consent to have a magistrate judge conduct any and all further proceedings in this case, including the entry of final judgment, by indicating your consent below.

Choose only one of the following:

☑ Plaintiff consents to magistrate judge jurisdiction as set forth above.

OR

☐ Plaintiff requests that a district judge be designated to decide dispositive matters and trial in this case.

29. Date you are mailing (or handing to a correctional officer) this Petition to this court: 6-15-08

PURSUANT TO 28 USC § 1746

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding. PRAYS FOR AN EVIDENTIARY HEARING SO HE CAN PRESENT EVIDENCE; PRAYS FOR THE APPOINTMENT OF COUNSEL IN THIS COMPLEX CASE. PETITIONER IS INDIGENT UNTRAINED IN LAW, LEGALLY BLIND, ADA ACT.

SIGNATURE OF ATTORNEY (IF ANY)

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct. Executed on

6-15-08
(DATE)

Jack W. Burton #F02720
SIGNATURE OF PETITIONER

BURTON, ERIC W. #F02720
P.O. BOX 5246 - C SATF/SP-C1-119L
CORCORAN, CA. 93212
IN PRO PER.

IN re ERIC BURTON ON FED. H.C. V. DIRECTOR OF THE C.D.C.R. RESP.

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ERIC W. BUATON #F02720
P.O. BOX 5246-CSATF/SP-C1-119C
CORCORAN, CA. 93212
IN PRO PER.

STATEMENT OF FACTS

ERIC W. BUATON #F02720, PURSUANT TO RULES 28 USC. 2244(b) 15(A) AND 19(A) FED.R.CIV.P. REQUESTS LEAVE TO AMEND PETITION (FED. H.C.)

1. THE PETITIONER HAS NEWLY DISCOVERED ON 6-10-08 FROM COURT FILES, THAT THE WITNESS THAT PROSECUTION FAILED TO DISCLOSE, AND HID, IS NOW IN FACT S. JONES #1031 (COURT DEPUTY) WITNL EYEWITNESS TO THE STALKING OF DEFENDANT IN THE COURT HOUSE VICINITY 18.USC.401(1) AND WITNESS TO PETITIONER'S MENTAL STATE OF FEAR ON OR NEAR THE DAY IN QUESTION 19 MARCH 04, THEREBY SIGNING A DECLARATED PROOF OF SERVICE ON 3-4-04, SERVICE TO ALLEGED VICTIM AND CONVICTED STALKER ALLEGED VICTIM SALINATHAN THOMAS. WITNESSES TESTIMONY WAS OF A CONCEIVABLE BENIFIT. THE SUPPRESSION OF THIS FAVORABLE DEFENSE WITNESS BY THE PROSECUTION DEPRIVING DEFENDANT HIS FEDERALLY GUARANTEED 14TH AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSES.

THIS PETITION IS AMENDED TO REFLECT THE IDENTITY OF THE [BALIFF] AND THE ACTIONS OF THIS PERSON NEWLY DISCOVERED TO BE S. JONES #1031.

ARGUMENT → THIS COURT SHOULD GRANT LEAVE FREELY TO AMEND THIS PETITION, (FED.H.C.) FOMAN V. DAVIS, 371 U.S. 178, 182. (1962)

MR. E. W. BURTON #F02720
P.O. BOX 5248 CSATF-CHAPEL
CORCORAN, CA. 93212
IN PRO PER

STATEMENT OF FACTS—

LINE OF AUTHORITY SEE TERRY V. OHIO, 392 U.S. AT 21, 88 S.CT AT 1879 SEE ALSO KATZ V. U.S. 389 U.S. 347 88 S.CT. 507, 19 L.Ed 2d 576 (1967), 103 S.Ct. 1339 TRIAL JUDGE WITH JUDICIAL CONFLICT, REPRESENTING THE PEOPLE FOR WELFARE RECIPIENT ANGELA SANDERS CASE # DF661759 SALINATHAN THOMAS, ALLEGED VICTIM (SEE MICRO FILM CC P668.5 REEL #2661-272) HAD THREATEN HIM BY STATING "I'M GOING TO KILL YOU IN THE PRESENCE OF DREONA BURTON ON 13 FEB 04. THE APPELLANT ERIC W. BURTON #F02720 REQUESTED U.S. MARSHALLS TO GIVE SERVICE TO MS. SANDERS AND MR. THOMAS, SUMMON'S AND NOTICE TO APPEAR IN COURT. UPON SERVING MS. SANDER'S, AT HER ADDRESS AT 1711 E. LEXINGTON TO GET EMERGENCY CUSTODY OF DREONA BURTON THE BAILIFF S. JONES #1031 I.D. NEWLY DISCOVERED 6-10-06 COURT IN THE PRESENCE AND ON RECORD BEFORE THE TRIAL JUDGE HON. HALGREN ON 23 FEB. 04, MR. THOMAS TESTIFIED AT TRIAL THAT HE WAS IN THE BACK ROOM WHEN U.S. MARSHALL'S SERVED MS. SANDERS, NOTICE TO APPEAR. THE APPELLANT WAS CONVERTED BY JUDGE HALGREN ON 23 FEB 04, FROM PETITIONER TO DEFENDANT, AND CASE WAS COMBINED WITH SETTLED CHILD SUPPORT CASE DISSOLVED ON OR ABOUT 20 OCT. 04 IN SAN DIEGO SUPERIOR COURT. AS PETITIONER IS DISABLED ON SSA/SSI SINCE MARCH 2002. DIAGNOSED LEGALLY BLIND IN BOTH EYES DUE TO OPTIC NERVE DAMAGE CAUSED BY GLAUCOMA. PEOPLE WERE A CONFLICTING PARTY #1 STALKING THE APPELLANT ON FEB 23, 2004, APPELLANT ALERTED COURT AND HER BAILIFF. THE HON JUDGE HALGREN ISSUED ANOTHER TRO, AGAINST MR. THOMAS, AND SIGNED OFF ON THE PREVIOUSLY ISSUED TRO, AND GAVE MS. SANDERS VERBATIM ORDERS THAT MR. THOMAS WAS NOT TO CONTACT DREONA BURTON, AN ORDER, HER ADMITTINGLY VIOLATED ON 19 MARCH 04. SEE R.T. 977, LINES 15-28 (JUDGE HALGREN) R.T. 978, LINES 2-8, R.T. 978 LINES 9-15, 17-24 (OMIT ALL OTHERS. SEE R.T. 715-825, R.T. 872, 877

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SEE RT.39,LINES1,4-6,9-11,19-28.RT.40,LINES1-9,12-25,27,28.RT.41,LINES 1-28RT42,LINES1-5 SEE RT.0124,RT,0125,RT.0127,RT0132,0137,0138,0139,0140,0143,0144,0145, SEE RT0073,RT165,LINES13-22,RT93,LINES6-19,12,15-18,23-28,RT94,LINES1-9

Grounds Cont. 14th U.S. Const.Amendt.

SEE RT.33(OFFICER)LINES3,RT.35,LINES1-4,6,7,10-16,18,19,21-25,27,28.RT36,LINES1-3,9-16,17,RT.37,LINES5-8,10,11,13,15-24,RT.38,LINES8-18,21-28.

Statement of facts; Reporters transcriptp.100

REDIRECT EXAMINATION BY Mr. Adair

Q.Mr Helsel, when the police arrived, did they have their guns out? SEE RT.39,LINES14-24,27,SEERT417,LINES1-17(6-21-05)

A.(Mr. Helsel)-Yes. SEE RT.33,LINES3,4,6,7,14-17,23-28.

Q.(Mr. Adair)-And they had their guns out until Mr. Burton was handcuffed? SEE RT.42,LINES7-20,22-28.RT.43,LINES1-26RT.45,LINES1-12,17-28RT.46LINES1-19,21-27

A.(MR. Helsel)-Yes. SEE RT51,LINES6-11,13,15-17,26,27,28.RT52LINE1,

The Court:This all happened pretty quickly once the police arrived on the scene? SEE RT.53LINES1-14,16-21,24,27,28.RT333,LINES1,2,14,15

A.(Mr. Helsel)-Pretty quick. SEE RT.166,LINES8-19,RT.165LINES13-22.

Q.(The Court)-They took him down at gunpoint,they proned him out on the ground? SEE RT713,LINES13-19.RT.

A.(Mr. Helsel) Yes, but he wasn't fighting or anything.

The Court-Understood RT.5,LINES1-23,26.RT.6,LINES2-20,

Q. (The Court)How long would you estimate he was on the ground before they escorted him to one of the patrol cars?

A.(Mr. Helsel) I dont know. 15, 20 seconds,30 seconds.

Reporters transcript page#103- SEE R.T.7,LINES3-7,9,17-21.RT.8LINE1

The court(The Honorable Judge Preckle)-All right. My tentative is as follows; To deny the motion to suppress relative to anything found in or removed from the vehicle [redacted] and the tenative is based upon the automobile exception to the fourth amendment.My tenative is further to grant the motion to suppress evidence from apartment#5, concluding that the people,after a full consideration and review of the evidence presented,have not met their burden of demonstrating to the court's satisfaction that the entry, search and seizure of items within the apartment was done pursuant to a consent rendered by MR. Burton.

Reporter's transcript page#105-

The Court(The HONORABLE JUDGE PRECKLE) I'm not satisfied there was a consent,whether free or voluntary or otherwise. That's my point.

Reporter's transcript page# 106-

The Court-Period

Ms. Hanna (prosecutor)-Your Honor, Agent Kirk's testimony-testified that--

The Court-I'm mindful of agent Kirk's testimony Ms. HANNA: and the circumstance and even the surrounding circumstances with the people's witnesses and the defendant's witnesses.

THE COURT:i've looked at all of it.I'm not persuaded.

The Court-The motion to suppress is granted in part for the reasons outlined by the court.The motion to suppress items from the vehicle is denied, not based upon a purported theory of consent,but rather based upon the automobile exceptionto the 4th Amendment.

BURTON [illegible] F02720 [illegible]
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CONTENTION

CONTENTION

STATEMENT OF FACTS. CASE IN SUPPORT OF GROUNDS [illegible] SEARCH AND SEIZURE OF PERSON, HOME, VEHICLE PARKED ON THE CURTILAGE WITHIN VICINTITY OF HOME, UNLAWFUL INTRUSION [illegible] REASONABLE EXPECTATION OF PRIVACY WITHIN THE FEDERALLY GUARANTEED PROTECTIONS OF THE 1ST, 4TH, AND 14TH U.S. CONST. AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 4TH & 14TH AMENDENT AND FREEDOM OF SPEECH AND EXPRESSION CLAUSES OF THE U.S. CONST 1ST. AMENDMENT

[redacted]

2. [redacted]

ARGUMENT

In the absence of an emergency or consent to search, a search without a warrant can be conducted only if it is incident to a lawful arrest and is restricted to the person of the arrestee or the area within the arrestee's immediate control. The search cannot exceed the area "beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him." (Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)

STATEMENT OF FACTS,

Mr. Burton was not in his apartment, or in his car, at the time of his arrest, therefore the searches were not justified, as no warrant was obtained.

[redacted]

THE UNLAWFUL WARRANTLESS SEARCH AND SEIZURE WITH UNREASONABLENESS OF PETITIONERS VEHICLE PARKED ON THE CURTILAGE OF HIS HOME AND SEARCH THEREOF WAS UNCONSTITUTIONAL AND VIOLATED HIS FIFTH, AND 14TH U.S. CONST AMENDMENT DUE PROCESS AND EQUAL PROTECTION [redacted] [illegible] CLAUSES AS PETITIONER WAS IN CUSTODY DURING THE SEARCH AND INTERROGATION OF HIS VEHICLE IN ITS REASONABLE EXPECTATION OF PRIVACY ON THE CURTILAGE OF HIS HOME

~~SEE EXHIBIT "E" PAGE 12~~, AT ~~EXCERPT~~ 0125 LINES 11-21.

~~SEE EXHIBIT "E" PAGE 12~~ AT ~~EXCERPT~~ 0073 LINES 1-28, SEE ALSO EXHIBIT "E" PAGE 4, AT ~~EXCERPT~~ 0132 LINES 1-28.

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[redacted] ~~the assertion of the privilege the defendant is entitled to be free of police-initiated attempts to interrogate him."~~ ~~(Burton supra at 384)~~ [redacted]

[redacted] ARGUMENT–
PETITIONER HAD A REASONABLE EXPECTATION OF PRIVACY UNDER HIS FEDERALLY GUARANTEED RIGHT UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE U.S. 14TH CONST AMENDMENT.

ALL EVIDENCE OBTAINED [redacted] MUST BE SUPPRESSED AS TAINTED EVIDENCE; FRUIT OF THE POISONOUS TREE AS A DIRECT VIOLATION OF POLICE UNLAWFUL INTRUSION OF PETITIONER'S HOME AND SEARCH, AND SEIZURE OF HIS PERSON AND VEHICLE PARKED ON CURTILAGE

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all."(Silverthorne Lumber Co. V. United States (1920) 251 U.S. 385) Not only is it well established that evidence which is illegally obtained cannot be used (Angelo v. U.S. (1925) 269 U.S. 20), but Mapp v. Ohio (1961) 367 U.S. 643 and Wong-Sun v. United States (1963) 371 U.S. 471 instruct us that the "fruits" resulting from evidence seized or leads resulting from the evidence must also be excluded. SEE - US v. CISNERS 448 F2d 298

When it appears that the evidence has been unlawfully acquired, the heavy burden of establishing the admissibility of the evidence on the theory that it would have been acquired by the police independent of the unlawful acquisition rests on the prosecution)People v. Superior Court of Alameda County (1978) 80 Cal 3d 665; KATZ V. U.S. 389 U.S. 347, 360, 88 S.Ct 507 (1967)

~~CONCLUSION~~

LAW REV 1951 - RIGHT TO RESIST ILLEGAL ARREST 39 C.L.R. 96111

~~Mr. Burton respectfully request the court suppress the gun, bullets and other evidence seized from his home as well as the notes, reports and the audio and video tape of his statement at the police station.~~

CLEARLY THE STATE HAD NOT MET THEIR BURDEN AS RULED BY THE HON. JUDGE PRECKEL AT THE 1538.5 HEARING.

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STATEMENT OF FACT

Furthermore, a salient fact not addressed by the Court of Appeal is that none of the self-defense instructions focused on the prior threats and their effect on the reasonableness of appellant's belief in the need to defend himself. As the court in *People v. Pena*, *supra*, 151 Cal.App.3d 462 suggests, absent a clear instruction to consider appellant's knowledge of the victim's prior threats to him and to others about him, we cannot be certain that the jurors did not construe the self-defense instructions given as "narrowing the scope of facts and circumstances which they were entitled to consider to only those perceived by any other 'reasonable man.' . . ." (*Id.* at p. 476.) O'NEAL V. MCANINCH 513 U.S. 432.

Another flaw with the Court of Appeal's analysis is it ignores the fact that the issue of prior threats was raised by appellant and was not a minor subissue in his defense. Rather, it was a major part of his defense. (See *People v. Pena*, *supra*, 151 Cal.App.3d at p. 476.) The absence of appellant's proffered instruction lightened the prosecution's burden, a burden memorialized in CALJIC No. 5.15, which informed the jury that the burden is on the prosecution ~~to prove the homicide was unlawful.~~ ERONEOUS

The Court of Appeal's analysis is also flawed because it does not address the fact the evidence against appellant was not open-and-shut. This was a close case. The jury deliberated over two days and acquitted appellant of child abuse/endangerment (Pen. Code, § 273a, subd. (a)) in count 4. (2 CT 288, 381-382.)

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QUESTIONS PRESENTED

1. DID STATE COURT HAVE JURISDICTION TO TRY PETITIONER DUE TO JUDICIAL AND PROSECUTORIAL CONFLICTS OF INTEREST IN LIGHT OF THE NEW EVIDENCE UNDER 28 U.S.C. 2244(b)
2. WAS PETITIONER DENIED HIS FEDERALLY GUARANTEED FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSES.
3. DID PETITIONER RECEIVE CRUEL AND UNUSUAL PUNISHMENT OF LIFE IN PRISON PLUS 25 YEARS TO LIFE CONSECUTIVELY IN LIGHT OF CUNNINGHAM V. CALIFORNIA, 75 U.S.L.W. 4078 (U.S. 2007.)
4. WAS THE DENIAL OF PETITIONER'S PROPERLY FILED FARETTA PROSE, PRETRIAL MOTION, AND TRIAL MOTION ON 19 JULY 05, PREJUDICIAL PRIOR TO THE JURY BEING SWORN, AND WAS THE FAILURE TO RULE, ERRONEOUS DENIAL AN ABUSE OF DISCRETION CONTRARY TO U.S. SUPREME COURT
5. IN LIGHT OF THE NEW EVIDENCE WAS PETITIONER DENIED HIS FEDERALLY GUARANTEED RIGHT TO MAKE A DEFENSE, AND RIGHT TO SELF REPRESENTATION VIOLATED,
6. WAS PETITIONER'S TRIAL A FUNDAMENTALLY FAIR TRIAL AS GUARANTEED BY THE U.S. CONSTITUTION IN LIGHT OF THE NEW EVIDENCE?

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REASONS FOR GRANTING THE PETITION

SEE SCHUP V. DELO (1995) 513 U.S. 298, 115 S.CT. 851 — THERE IS NEWLY DISCOVERED EVIDENCE 28 USCS § 2244(b)

1. PETITIONER IS UNCONSTITUTIONALLY INCARCERATED.

2. PETITIONER RAISED ON AT LEAST 4 GROUNDS AND CONTENTIONS PER SE RELEASE IN HIS ALLEGED EXHAUSTED PETITION WITH CERTAINTY, GROUNDS AND CONTENTIONS AS ALLEGED IN FEDERAL H.C. PETITION FOR RELIEF ARE MERITORIOUS SEE CONLEY V. GIBSON, 355 US 41, 45-46 (1957)

3. ~~TRIAL~~ COURT WAS INCORRECT IN IT'S FACTUAL FINDINGS.

4. ~~ON DIRECT APPEAL THE APPEALS COURT WAS INCORRECT IN~~ ~~IN HIS FACTUAL FINDING CONTRARY TO U.S. SUPREME COURT.~~ ~~THE CAL.SUPREME COURT WAS INCORRECT IN IT'S DENIAL~~ ~~REVIEW CONTRARY TO SUPREME COURT~~ V. LONG 9TH CIR 2001 253 F.3d

5. REASONABLE JURISTS WOULD FIND IT DEBATABLE WHETHER ~~THE TRIAL~~ COURT WAS CORRECT IN IT'S PROCEDURAL RULING, AND REASONABLE JURISTS WOULD FIND IT DEBATABLE WHETHER THE PETITION STATES A VALID CLAIM OF DENIAL OF A CONSTITUTIONAL RIGHT SEE CRUZ V. BETO, 405 U.S. 319, 322 (1972).

6. AED PA APPLIES TO THE PROCEDURE IN THE CASE BUT NOT THE MERITS OF THE CASE, SEE MORRIS V. WOODFORD (9TH CIR. 2000) 273 F.3d 826; SLACK V. MCDANIEL (2000) 529 U.S. 473 [120 S.CT. 1595, 146 L.ED.2d 542].

7. THERE IS NO OTHER PLAIN, SPEEDY OR ADEQUATE LEGAL REMEDY

8. PETITIONER WAS DENIED HIS FEDERALLY GUARANTEED RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE U.S. CONSTITUTION.

9. "MAIL BOX RULE"
SEE ARTUZ V. BENNETT (2000) 531 U.S. 4 [121 S.CT. 361]; MILES V. PRUNTY (9TH CIR (1999) 187 F.3d 1104; HUIZAR V. CAREY (9TH CIR 2001) 273 F.3d 1220

9. PETITIONER USED THE CORRECT FEDERAL H.C. FORM, TIMELY FILED IN THE EASTERN CALIFORNIA DISTRICT OF THE U.S. DISTRICT COURT, THE CORRECT JURISDICTION WHERE PETITIONER IS INCARCERATED PETITION AND IT'S ATTACHED ADDITIONAL GROUNDS AND CONTENTIONS, R.T. EXHIBITS, STATEMENT OF FACTS, AND ATTACHED MEMORANDUM OF POINTS AND AUTHORITIES, WITH CLEAR SIMPLE CONCISE DIRECTIONS OF EXACTLY WHERE PETITIONER WANTED THE U.S. DISTRICT COURT TO GO, WAS NEATLY ORGANIZED AND HANDED OVER TO PRISON AUTHORITIES FOR FIRST CLASS LEGAL MAIL PROCESSING ON OR ABOUT 02-02-08, AND FILED PROPERLY WITHOUT ANY DISCREPANCIES NOTED BY THE COURT CLERK FILED ON 02-06-08, IN THE EASTERN CALIFORNIA DISTRICT AND TRANSFERRED TO THE SOUTHERN CALIFORNIA DISTRICT, RECEIVED AND FILED BY THE CLERK OF COURT ON OR ABOUT 2-19-08, ALONG WITH, A MOTION FOR THE APPOINTMENT OF COUNSEL, AND MOTION TO PROCEED IN FORMA PAUPERIS, THAT WAS GRANTED.

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MEMORANDUM AND POINTS OF AUTHORITIES

ARGUMENT- FAILURE TO CONSIDER THE CLAIMS WILL RESULT IN A FUNDAMENTAL MISCARRIAGE OF JUSTICE SEE COLEMAN V. THOMPSON, 501 U.S. 722, 750, 111 S.CT. 2546, 115 L.Ed.2d 640 (1991) MAIL BOX RULE, 28 U.S.C. §1746; SEE HUIZAR V. CAREY (9TH CIR. 2001) 273 F.3d 1220. "EVEN IF THE DOCUMENT WAS NEVER DELIVERED TO OR FILED BY THE COURT." ! REGARDLESS OF WHETHER THE COURT EVENTUALLY FOUND THE CLAIMS WERE PROCEDURALLY BARRED. ARTUZ V. BENNETT (2000) 531 U.S. 4, [121 S.Ct. 361], SEE ALSO SMITH V. DUNCAN (9TH CIR. 2001) 274 F.3d 1245. PREJUDICIAL ERROR FOR THE COURT TO FAIL TO INFORM THE PETITIONER ABOUT HIS OBTIONS, OR ADVISE HIM ABOUT THE TECHNICAL REQUIREMENTS OF DISMISSING A PETITION AND RENEWING STAY MOTIONS. SEE FORD V. HUBBARD, (9TH CIR. 2003) 330 F.3d 1086.; SMITH V. RATELLE (9TH CIR. 2003) 323 F.3d 813 CONLEY V. GIBSON, 355 U.S. 41, 45-46 (1957), THE U.S. SUPREME COURT SAID THAT IN CONSIDERING A MOTION TO DISMISS, A PRO SE COMPLAINT SHOULD BE HELD TO LESS STRICT STANDARDS THAN A MOTION DRAFTED BY A LAWYER; IN CRUZ V. BETO, 405 U.S. 319, 322 (1972), THE U.S. SUPREME COURT STATED THAT A COMPLAINT "SHOULD NOT BE DISMISSED FOR FAILURE TO STATE A CLAIM UNLESS IT APPEARS BEYOND DOUBT THAT THE PLAINTIFF (PETITIONER) CAN PROVE NO SET OF FACTS IN SUPPORT OF HIS CLAIM WHICH WOULD ENTITLE HIM TO RELIEF."

IN THE NINTH CIRCUIT, PRISONERS ALSO HAVE A RIGHT TO AMEND THE COMPLAINT EVEN IF IT IS NOT THE FIRST TIME, TO OVERCOME ANY PROBLEMS WITH IT, UNLESS IT IS ABSOLUTELY CLEAR THAT THE PROBLEMS CAN'T BE FIXED. POTTER V. MC CALL, 433 F.2d 1087 (9TH CIR. 1970).

SEE MILLER-EL V. COCKRELL (U.S. 2003) 537 U.S. 322, 123 S.Ct. 1029. CERTIORARI WAS GRANTED THE SUPREME COURT JUSTICE KENNEDY HELD THAT REASONABLE JURISTS COULD HAVE DEBATED WHETHER PROSECUTION USE OF PEREMPTORY STRIKES AGAINST AFRICAN-AMERICAN PROSPECTIVE JURORS WAS RESULT OF PURPOSEFUL DISCRIMINATION, AND THUS PETIONER WAS ENTITLED TO COA, REVERSED AND REMANDED.

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I

CODE C.I.V. PROC. § 2031.020 AS ADDED IN 2004 PROVIDES THAT A DEFENDANT MAY MAKE A DEMAND FOR INSPECTION WITHOUT LEAVE OF COURT AT ANY TIME THAT IS 10 DAYS AFTER THE SERVICE ON, OR IN UNLAWFUL DETAINER ACTIONS WITHIN FIVE DAYS AFTER SERVICE OF THE SUMMONS ON OR APPEARANCE BY THE PARTY TO WHOM THE DEMAND IS DIRECTED, WHICH EVER OCCURS FIRST.

CODE C.I.V. PROC § 2032.250 AS ADDED IN 2004, PROVIDES THAT A DEFENDANT WHO HAS DEMANDED A PHYSICAL EXAMINATION OF A PLAINTIFF MAY MOVE FOR AN ORDER COMPELLING COMPLIANCE IF THE DEFENDANT DEEMS THAT ANY MODIFICATION OR REFUSAL OF THE DEMAND IS UNWARRANTED. IN A

THE EXISTENCE OF A DOCUMENT CONTAINING PRIVILEGED INFORMATION, IS NOT PRIVILEGED. BEST PRODUCTS INC. V. SUPERIOR COURT, 119 CAL. RPTR. 3d 154 (2d DIST 2004)

CODE C.I.V. PROC § 2031.010 AS ADDED IN 2004, PROVIDES THAT ANY PARTY MAY OBTAIN DISCOVERY BY INSPECTING DOCUMENTS, TANGIBLE THINGS, AND LAND OR OTHER PROPERTY THAT ARE IN THE POSSESSION, CUSTODY, OR CONTROL OF ANY OTHER PARTY TO THE ACTION.

THE RULES OF DISCOVERY ARE APPLIED LIBERALLY IN FAVOR OF DISCLOSURE, AND CONTRARY TO POPULAR BELIEF, FISHING EXPEDITIONS ARE PERMISSIBLE IN SOME CASES. WEST'S ANN. CAL. C.C.P. § 2017. WEST'S ANN. CAL. C.C.P. § 2017, GARMENDI V. GOLDEN EAGLE INS. CO. 10 CAL. RPTR. 3d 724 (CAL. APP. 1ST. DIST. 2004). SEE ALSO C.C.P. § 2017.010

IN LIGHT OF CUNNINGHAM V. CALIFORNIA- BAILSON ERROR?

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PT. 0149-

USLW. (9-11-07) ISSN 0148-8139, 1140 (VOL. 76, NO. 9) SUMMARY AND ANALYSIS

DUE PROCESS REQUIRES THE BOARD OF IMMIGRATION APPEALS TO GIVE AN ASYLUM SEEKER AN OPPORTUNITY TO RESPOND BEFORE IT ENTERS A FINAL ORDER ON THE BASIS OF ADMINISTRATIVELY NOTICED FACTS, THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT HELD AUG. 17 (BURGER V. GONZALES, 2d CIR., NO. 03-4035 AG, 8/17/07). ACCORDING TO THE COURT, AN ASYLUM APPLICANT MUST BE GIVEN NOTICE OF AND AN EFFECTIVE CHANCE TO RESPOND TO POTENTIALLY DISPOSITE, ADMINISTRATIVELY NOTICED FACTS. THE GOVERNMENT RESPONDED, HOWEVER, THAT THE PETITIONER'S MOTION TO REOPEN GAVE HER A FULL AND FAIR OPPORTUNITY TO PRESENT HER CLAIM AND THUS CURED ANY LACK OF ADVANCE NOTICE. THE FIFTH, SEVENTH, AND DISTRICT OF COLUMBIA CIRCUITS HAVE RULED THAT A MOTION TO REOPEN SUFFICES TO SATISFY DUE PROCESS IN THIS CONTEXT. THE NINTH AND TENTH CIRCUITS, HOWEVER HAVE HELD THAT DUE PROCESS REQUIRES THAT THE BIA PROVIDE APPLICANTS WITH NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE THE BIA DETERMINES ON THE BASIS OF ADMINISTRATIVELY NOTICED FACTS THAT A PETITIONER LACKS A WELL-FOUNDED FEAR OF PERSECUTION. THE COURT HERE SIDED WITH THE NINTH AND TENTH CIRCUITS. IT SAID THAT "THE REOPENING PROCEDURES HAS SERIOUS LIMITATIONS AS A GUARANTY OF DUE PROCESS." THE BIA'S DECISION TO GRANT A MOTION TO REOPEN IS PURELY DISCRETIONARY, IT SAID. "MOREOVER, BECAUSE THE FILING OF A MOTION TO REOPEN DOES NOT AUTOMATICALLY STAY THE EXECUTION OF AN ORDER OF REMOVAL... THE APPLICANTS DUE PROCESS RIGHTS DEPEND ENTIRELY ON THE BIA'S GOOD FAITH."

THUS IT CANNOT BE SAID THAT THE PETITIONER'S MOTION TO REOPEN PROTECTED HER RIGHT TO BE HEARD AT A MEANINGFUL MANNER, THE COURT SAID. EVEN THOUGH THE DISMANTLING OF THE MILOSEVIC REGIME MAY HAVE BEEN A COMMONLY KNOWN CURRENT EVENT, "THE BIA ERRED BY FAILING TO GIVE [THE PETITIONER] ADVANCE NOTICE OF IT'S INTENTION TO CONSIDER THIS EXTRA-RECORD FACT," THE COURT SAID. "MOREOVER, THE BIA ERRED IN DEPRIVING [THE PETITIONER] OF THE OPPORTUNITY TO REBUT THIS FACT'S SIGNIFICANCE BEFORE ISSUING IT'S DECISION," IT SAID. JUDGES GUIDO CALABRESI AND SONIA SOTOMAYOR JOINED THE OPINION.

RT0144
RT0145

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WHEN A DEFENDANT PLEADS NOT GUILTY, THE COURT LACKS JURISDICTION TO CONVICT HIM OR HER OF AN OFFENSE THAT IS NEITHER CHARGED NOR NECESSARILY INCLUDED IN THE ALLEGED CRIME. PEOPLE V. PARKS, 12 CAL. RPTR. 3d 635 (CAL. APP. 2d DIST. 2004), AS MODIFIED, (APR. 28, 2004) AND REVIEW FILED (APR. 29, 2004). A CRIMINAL DEFENDANT IS ENTITLED TO NOTICE OF THE CHARGES AGAINST HIM. PEOPLE V. PERCELLE, 126 CAL. APP. 4TH 164, 23 CAL. RPTR. 3d 731 (6TH DIST. 2005).

PRIOR OPPORTUNITY FOR CROSS-EXAMINATION IS REQUIRED FOR ADMISSION OF (ALLEGED) OUT-OF-COURT TESTIMONIAL EVIDENCE. CRAWFORD V. WASHINGTON (2004) 541 U.S. 36, 124 S.CT. 1354, 1365, 158 L.Ed. 2d 177, 184, 3 CAL. EVIDENCE (4TH) PRESENTATION AT TRIAL, SUPP. § 21, HELD THAT WITH FEW POSSIBLE AND NARROW EXCEPTIONS, THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT ALLOWS ADMISSION OF AN OUT-OF-COURT TESTIMONIAL STATEMENT ONLY IF THE WITNESS IS UNAVAILABLE AND THERE WAS PRIOR OPPORTUNITY FOR CROSS-EXAMINATION; REJECTING THE COURT'S EARLIER ANALYSIS IN OHIO V. ROBERTS (1980) 448 U.S. 56, 100 S. CT. 2531, 65 L.Ed 597 TEXT P. 769.

DISCOVERY RULES ARE APPLIED LIBERALLY IN FAVOR OF DISCOVERY, AND CONTRARY TO POPULAR BELIEF, FISHING EXPEDITIONS ARE PERMISSIBLE IN SOME CASES, CRUZ V. SUPERIOR COURT, 17 CAL. RPTR. 3d 368 (CAL. APP. 4TH DIST. 2004) SEE CODE CIV. PROC. § 2024.060.

TRUMPED UP CHARGES - STEVEN G. MASON, 6 FLA. DEFENDER 34 (WINTER 1994)

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IN APPRENDI V. NEW JERSEY, 530 U.S. 466 (2000), OR RING V. ARIZONA 536 U.S. 584, 70 U.S.L.W. 4666 (2000) SUGGEST SENTENCER IN SUCH SYSTEM MUST FIND ANY AGGRAVATING FACTOR TRUE BEYOND REASONABLE DOUBT. (BY EACH JUROR) ADMIN. LAW JUDGES WRITTEN DECISION DENYING MINOR'S BENEFIT FOR CHILDHOOD ASTHMA UNDER SUPPLEMENTAL SECURITY INSURANCE (SSI) PROGRAM FAILED TO IDENTIFY WHAT EVIDENCE OR INFERENCE JUSTIFIED DETERMINATION THAT MINOR'S ASTHMA WAS NOT SEVERE ENOUGH TO MEET, MEDICAL LISTING FOR CHILDHOOD ASTHMA, AND THUS, REMAND WAS REQUIRED FOR EXPLANATION OF FINDINGS. BROWN ex rel. MCCURDY V. APFEL, C.A. 4 (N.C.) 2001, 11 FED. APPX. 58, 2001 WL 305834, UNREPORTED.

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REASONABLE DOUBT FOR A RATIONAL TRIER OF FACT. SEE JACKSON V. VIRGINIA (1979) 443 U.S. 307, 318-19 [90 S.CT. 2781; 61 L.Ed.2d 560].

THE FIFTH AMENDMENT GUARANTEES A CRIMINAL DEFENDANT THE RIGHT TO STAND TRIAL ONLY ON CHARGES MADE BY A GRAND JURY IN IT'S INDICTMENT. U.S.CA. CONST. AMEND. 5. U.S. V. ADAMSON, 291 F.3d 606 (9TH CIR. 2002)

THE BURDEN OF PROOF IS ON THE STATE TO SHOW THAT AN ERROR DID NOT SUBSTANTIALLY INFLUENCE THE JURY'S DECISION AND DOUBT SHOULD BE RESOLVED IN FAVOR OF THE PETITIONER. SEE O'NEAL V. MCANINCH (1995) 513 U.S. 432 [115 S.CT. 992; 130 L.Ed.2d 947; STATES VIOLATION OF DUE PROCESS IN FAILING TO FOLLOW IT'S OWN EVIDENTIARY RULES. ESTELLE V. MCGUIRE (1991) 502 U.S. 62; HICKS V. OKLAHOMA (1980) 447 U.S. 343, 100 S.CT. 2227

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DISCOVERY IN CALIFORNIA IS NOW GOVERNED BY CONSTITUTIONAL AND STATUTORY ENACTMENT. ARTICLE I, SECTION 30 SUBDIVISION(C), OF THE CALIFORNIA CONSTITUTION PROVIDES IN PART, AS PRESCRIBED BY THE LEGISLATURE.

PROPOSITION 115 ALSO ADDED A CHAPTER TO THE PENAL CODE SETTING FORTH BOTH SUBSTANTIVE AND PROCEDURAL RULES FOR DISCOVERY. ONE OF THE STATED PURPOSES OF THIS CHAPTER IS, "OR AS MANDATED BY THE CONSTITUTION OF THE UNITED STATES".

PENAL CODE SECTION 1054.1 SPECIFICALLY DEFINES THE MATTERS THE DISTRICT ATTORNEY MUST DISCLOSE TO THE DEFENDANT. THE PROSECUTOR'S OBLIGATION EXTENDS TO MATERIAL KNOWN TO BE IN THE POSSESSION OF THE INVESTIGATING AGENCY. (SEE IN re LITTLEFIELD (1993) 5 CAL. 4TH 122, 135 - IN POSSESSION INCLUDES MATERIAL REASONABLY ACCESSIBLE) SEE U.S. V. AGURS (1976) 427 U.S. 97, 49 L.Ed.2d, 96 S.Ct. 2392. IN U.S. V. AGURS THE SUPREME COURT STATED THAT FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS REQUIRE THAT THE SCOPE OF THE DUTY TO DISCLOSE BE EXPANDED. UNDER AGURS THE PROSECUTOR HAS A DUTY TO DISCLOSE ANY EVIDENCE WHICH IS OBVIOUSLY EXCULPATORY IN NATURE. UNLIKE THE DUTY UNDER BRADY WHICH REQUIRES THAT ON REQUEST EVIDENCE MUST BE DISCLOSED IF IT MIGHT AFFECT THE OUTCOME OF THE TRIAL, UNDER AGURS THE DUTY TO DISCLOSE UNREQUESTED MATERIAL ARISES IF THE EVIDENCE WOULD CREATE A REASONABLE DOUBT OF GUILT. Id AT P. 112., IN GILES V. MARYLAND 386 U.S. 66, 17 L.Ed.2d 737, 87 S.C.T. 793, CONFORMED TO 245 Md 342, 227 A 2d 745, IN GILES, JUSTICE FORTAS STATED THE TEST FOR DISCLOSURE

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SHOULD SIMPLY BE THE MATERIALITY OF THE INFORMATION SOUGHT IN THE CASE AND ITS POSSIBLE USEFULNESS IN THE PREPARATION OF THE DEFENSE, REGARDLESS OF ITS ULTIMATE ADMISSIBILITY AT TRIAL. THE RELEVANT INQUIRY IS AN ESSENTIALLY FACTUAL ONE TO DETERMINE WHETHER IN THE CIRCUMSTANCES OF A PARTICULAR CASE THE INFORMATION SOUGHT, WHATEVER IT'S CHARACTER, MAY BE MATERIAL AND HELPFUL TO THE PREPARATION OF A DEFENSE, SEE BRADY V. MARYLAND (1963) 373 U.S. 82, 10 L.Ed.2d 215, 83 S.Ct. 1194. IN BRADY V. MARYLAND, THE U.S. SUPREME COURT EMPHASIZED THAT THE DUE PROCESS CLAUSE OF THE CONSTITUTION COMPELS DISCLOSURE OF INFORMATION IN THE POSESSION OF THE PROSECUTION IN SOME CIRCUMSTANCES. THE COURT STATED THAT THE SUPPRESSION BY THE PROSECUTION OF EVIDENCE FAVORABLE TO AN ACCUSED VIOLATES DUE PROCESS WHERE THE DEFENSE REQUESTS THE INFORMATION AND WHERE THE EVIDENCE IS MATERIAL EITHER TO GUILT OR TO PUNISHMENT, IRRESPECTIVE OF THE GOOD OR BAD FAITH OF THE PROSECUTION." (6/25/07), USLW (VOL. 76, NO. 9) 3085, 07-6, GIGLIO/ANELLI V. U.S. - OBSTRUCTION OF JUSTICE - ENDEAVORING THEORY (2d. CIR., 464 F.3d 346): OMNIBUS CLAUSE OF FEDERAL OBSTRUCTION-OF-JUSTICE STATUTE, 18 U.S.C. § 1503, WHICH COVERS ONE WHO, INTER ALIA, "CORRUPTLY ... ENDEAVORS TO INFLUENCE, OBSTRUCT, OR IMPEDE, THE DUE ADMINISTRATION OF JUSTICE," APPLIES TO ACTIONS OF ORGANIZED CRIME FIGURE IN OBTAINING DETAILED AND SENSITIVE INFORMATION FROM GRAND JURY PROCEEDINGS THAT HE THEN PASSED ALONG TO TARGETS OF INVESTIGATION, ALL OF WHICH HAD, ACCORDING TO PROSECUTION'S CHARGE, "THE NATURAL AND PROBABLE EFFECT OF INTERFERING WITH THE DUE ADMINISTRATION OF JUSTICE."

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ACCORDINGLY, THE APPROPRIATE TEST FOR PREDJUDICE FINDS IT ROOTS IN THE TEST FOR MATERIALITY OF EXCULPATORY INFORMATION NOT DISCLOSED TO THE DEFENSE BY THE PROSECUTION, U.S. V. AGURS, 427 U.S. AT 104, 112-113, 96 S.CT. AT 2397, 2401-2402, AND IN THE TEST FOR MATERIALITY OF TESTIMONY MADE UNAVAILABLE TO THE DEFENSE BY GOVERNMENT DEPORTATION OF A WITNESS, U.S. V. VALENZUELA-BERNAL, SUPRA, 458 U.S. AT 872-874, 102 S.CT., AT 3449-3450.

SEE - ILLINOIS V. FISHER (2-23-04) CITE AS 124 S.CT. 1200 (2004) THE APPELLATE COURT REVERSED THE CONVICTION, HOLDING THAT THE DUE PROCESS CLAUSE REQUIRED DISMISSAL OF THE CHARGE RELYING ON THE ILLINOIS SUPREME COURT'S DECISION IN ILLINOIS V. NEWBERRY 166 ILL.2d. 310, 209 ILL. DEC. 748, 652 N.E.2d 288 (1995) THE APPELLATE COURT REASONED: WHERE EVIDENCE IS REQUESTED BY THE DEFENSE IN A DISCOVERY MOTION, THE STATE IS ON NOTICE THAT THE EVIDENCE MUST BE PRESERVED, AND THE DEFENSE IS NOT REQUIRED TO MAKE AN INDEPENDENT SHOWING THAT THE EVIDENCE HAS EXCULPATORY VALUE IN ORDER TO ESTABLISH A DUE PROCESS VIOLATION. IF THE STATE PROCEEDS TO DESTROY THE EVIDENCE APPROPRIATE SANCTIONS MAY BE IMPOSED EVEN IF THE DESTRUCTION IS INADVERTENT. NO SHOWING OF BAD FAITH IS NECESSARY" APP. TO PET. FOR CERT. 12 (QUOTING NEWBERRY SUPRA, AT 317, 209 ILL. DEC. AT 752, 652 N.E.2d, AT 292) (CITATION OMITTED.

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IN U.S. V. AGURS (1976) 427 U.S. 97 49 L.Ed.2d 342, 96 S.CT. 2392, THE SUPREME COURT STATED THAT THE SCOPE OF THE DUTY TO DISCLOSE ANY EVIDENCE WHICH IS OBVIOUSLY EXCULPATORY IN NATURE UNLIKE THE DUTY UNDER BRADY WHICH REQUIRES THAT ON REQUEST EVIDENCE MUST BE DISCLOSED IF IT MIGHT AFFECT THE OUTCOME OF THE TRIAL, UNDER AGURS THE DUTY TO DISCLOSE UNREQUESTED MATERIAL ARISES IF THE EVIDENCE WOULD CREATE A REASONABLE DOUBT OF GUILT (alleged) Id. AT A112. GILES V. MARYLAND, 386 U.S. 66, 17 L.Ed.2d 737, 87 S.CT. 793 CONFORMED TO 245 Md 342, 227 A 2d 745. IN GILES JUSTICE FORTAS STATED THE TEST FOR DISCLOSURE SHOULD SIMPLY BE THE MATERIALITY OF THE INFORMATION SOUGHT IN THE CASE AND IT'S POSSIBLE USEFULNESS IN THE PREPARATION OF THE DEFENSE, REGARDLESS OF IT'S ULTIMATE ADMISSIBILITY AT TRIAL. THE RELEVANT INQUIRY IS AN ESSENTIALLY FACTUAL ONE TO DETERMINE WHETHER IN THE CIRCUMSTANCES OF A PARTICULAR CASE THE INFORMATION SOUGHT, WHATEVER IT'S CHARACTER MAY BE MATERIAL AND HELPFUL TO THE PREPARATION OF A DEFENSE. IN —
BRADY V. MARYLAND, THE SUPREME COURT EMPHASIZED THAT THE DUE PROCESS CLAUSE OF THE CONSTITUTION COMPELS DISCLOSURE OF INFORMATION IN THE POSSESSION OF THE PROSECUTION IN SOME CIRCUMSTANCES. THE COURT STATED THAT SUPPRESSION BY THE PROSECUTION OF EVIDENCE FAVORABLE TO AN ACCUSED VIOLATES DUE PROCESS WHERE

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THE DEFENSE REQUEST THE INFORMATION AND WHERE THE EVIDENCE IS EXPECTED TO PLAY A ROLE IN THE DEFENSE. IN UNITED STATES V. AGURS (1976) 427 U.S. 97, THE SUPREME COURT STATED THAT FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS REQUIRE THAT THE SCOPE OF THE DUTY TO DISCLOSE BE EXPANDED. SEE KILBOURN V. STATE, 9 CONN. 560, 563, 1833 WL 68 (1833) "NO PERSON OUT TO BE, OR CAN BE SUBJECTED TO A CUMULATE PENALTY WITHOUT BEING CHARGED WITH A CUMULATIVE PENALTY WITHOUT BEING CHARGED WITH A CUMULATIVE OFFENCE", HINES V. STATE, 26 GA. 614, 616, 1859 WL 2341 (1859) REVERSING ENHANCED SENTENCE IMPOSED BY TRIAL JUDGE AND EXPLAINING [T]HE QUESTION, WHETHER THE OFFENCE WAS A SECOND ONE, OR NOT, WAS A QUESTION FOR THE JURY... THE ALLEGATION [OF A PRIOR OFFENCE] IS CERTAINLY ONE OF THE FIRST IMPORTANCE TO THE ACCUSED, FOR IF IT IS TRUE, HE BECOMES SUBJECT TO A GREATLY INCREASED PUNISHMENT"), AS QUOTED IN APPRENDI V. NEW JERSEY, 530 U.S. 466 (2000) SEE WIGGINS V. SMITH (2003) 539 U.S. 510, 123 S.CT. 2527, 2536, 156 L.Ed.2d 471, 486 [FAILURE BY DEFENSE COUNSEL TO INVESTIGATE AND DISCOVER AND PRESENT ADMISSIBLE EVIDENCE IN MITIGATION OF PENALTY WAS PREJUDICIAL]. IN UNITED STATES V. CRONIC (1984) 466 U.S. 648, 104 S.CT. 2039, 80 L.Ed.2d 657, DEFENDANT'S POSITION WAS NOT THAT COUNSEL FAILED TO OPPOSE THE PROSECUTION THROUGHOUT THE SENTENCING PROCEEDING BUT THAT COUNSEL FAILED TO DO SO AT SPECIFIC POINTS (122 S.CT. 1851, 152 L.Ed.2d 928.

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AS QUOTED IN ILLINOIS V. FISHER (2-23-04) CITE AS 124 S.CT. 1200 (2004) THE APPELLATE COURT OBSERVED THAT NEWBERRY DISTINQUISHED OUR DECISION IN YOUNGBLOOD ON THE GROUND THAT THE POLICE IN YOUNGBLOOD DID NOT DESTROY EVIDENCE SUBSEQUENT TO A DISCOVERY MOTION BY THE DEFENDANT. APP. TO PET. FOR CERT 13.

CONSEQUENTLY, THE COURT CONCLUDED THAT RESPONDENT "WAS DENIED DUE PROCESS WHEN HE WAS TRIED SUBSEQUENT TO THE DESTRUCTION OF THE ALLEGED COCAINE". APP. TO PET. FOR CERT 16. THE ILLINOIS SUPREME COURT DENIED LEAVE TO APPEAL.

THE FOURTH PRONG OF THE SPEEDY TRIAL BALANCING TEST WAS MODIFIED BY DOGGETT V. UNITED STATES, WHICH RECOGNIZED THE POSSIBILITY THAT SOME DELAYS MAY BE FOUND TO BE PRESUMPTIVELY PREJUDICIAL TO A DEFENDANT. THE COURT REASONED THAT EXCESSIVE DELAY CAN COMPROMISE THE RELIABILITY OF A TRIAL IN UNIDENTIFIABLE AND NOT EASILY SUBSTANTIATED WAYS. IN CASES OF EXTREME DELAY, THE BURDEN NOW RESTS WITH THE STATE TO PROVE THE DELAY HAS NOT CAUSED ANY PREJUDICE TO THE DEFENDANT. SEE DOGGETT V. UNITED STATES (1992) 505 U.S. 647, 657 [112 S.CT. 2686; 120 L.Ed.2d 520]. GENERALLY, THE LONGER THE DELAY AND THE MORE ACTUAL PREJUDICE A DEFENDANT CAN SHOW, THE BETTER THE CHANCES OF SUCCESS. AS FOR THE REASON FOR THE DELAY, ANY DELIBERATE DELAY ON THE PART OF THE STATE (BARKER V. WINGO (1972) 407 U.S. 514, 531 [92 S.CT. 2182, 33 L.Ed.2d 101] OR ANY DELAY DUE TO THE STATE'S NEGLIGENCE (CHAUNCEY V. SECOND JUDICIAL DISTRICT COURT (9TH CIR. 1973) 474 F.2d 1238, WILL BE WEIGHED AGAINST THE STATE.

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SEE U.S. V. AGURS (1976) 427 U.S. 97, 96 S. CT. 2392. IN U.S. V. AGURS THE SUPREME COURT STATED THAT FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS REQUIRE THAT THE SCOPE OF THE DUTY TO DISCLOSE BE EXPANDED, UNDER AGURS THE PROSECUTOR HAS A DUTY TO DISCLOSE ANY EVIDENCE WHICH IS OBVIOUSLY EXCULPATORY IN NATURE. SEE U.S. V. VALENZUELA-BERNAL, 458 U.S. 858, 102 S. CT. 3440 (U.S. CAL. 1982), DEFENDANT WAS CONVICTED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA OF TRANSPORTING AN ILLEGAL ALIEN AND HE APPEALED. THE COURT OF APPEALS FOR THE NINTH CIRCUIT, 647 F. 2d 72. REVERSED THE COURT OF APPEALS REVERSED THE CONVICTION, THE COURT RELIED UPON THE RULE, FIRST STATED IN UNITED STATES V. MENDEZ-RODRIGUEZ, 450 F. 2d 1 (CA9 1971), THAT THE GOVERNMENT VIOLATES THE FIFTH AND SIXTH AMENDMENTS WHEN IT DEPORTS ALIEN WITNESSES BEFORE DEFENSE COUNSEL HAS AN OPPORTUNITY TO INTERVIEW THEM. 647 F. 2d 72, 73-75 (1981). ALTHOUGH IT STATED THAT A CONSTITUTIONAL VIOLATION OCCURS ONLY WHEN "THE ALIENS TESTIMONY COULD CONCEIVABLY BENIFIT THE DEFENDANT." "THE DEPORTED ALIENS WERE EYEWITNESSES TO, AND ACTIVE PARTICIPANTS IN, THE CRIME CHARGED, THUS ESTABLISHING A STRONG POSSIBILITY THAT THEY COULD HAVE PROVIDED MATERIAL AND RELEVANT INFORMATION CONCERNING THE EVENTS CONSTITUTING THE CRIME." Id., AT 75. ACCORDINGLY, THE COURT OF APPEALS HELD THAT RESPONDENT'S MOTION TO DISMISS THE INDICTMENT SHOULD HAVE BEEN GRANTED BY THE DISTRICT COURT. RESPONDENT MOVED IN THE DISTRICT COURT TO DISMISS THE INDICTMENT, CLAIMING THAT THE GOVERNMENT'S DEPORTATION OF THE TWO PASSENGERS OTHER THAN ROMERO-NAVALES VIOLATED HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW AND

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HIS SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS FOR OBTAINING FAVORABLE WITNESSES. HE CLAIMED THAT THE DEPORTATION HAD DEPRIVED HIM OF THE OPPORTUNITY TO INTERVIEW THE TWO REMAINING PASSENGERS TO DETERMINE WHETHER THEY COULD AID IN HIS DEFENSE. ALTHOUGH HE HAD BEEN IN THEIR PRESENCE THROUGHOUT THE ALLEGEDLY CRIMINAL ACTIVITY, RESPONDENT MADE NO ATTEMPT TO EXPLAIN HOW THE DEPORTED PASSENGERS COULD ASSIST HIM IN PROVING THAT HE DID NOT KNOW THAT ROMERO-MORALES WAS AN ILLEGAL ALIEN WHO HAD LAST ENTERED THE UNITED STATES WITHIN THE PRECEDING THREE YEARS.

"[T]HE PROSECUTION MAY NOT DENY ACCESS TO A WITNESS BY HIDING [458 U.S. 866] HIM OUT. SEE FREEMAN V. STATE OF GEORGIA, 599 F.2d 65 (5TH CIR. 1979) (POLICE DETECTIVE CONCEALED LOCATION OF 'A46 WITNESS)." III. VIEWING THE GOVERNMENT'S CONDUCT IN THIS LIGHT, WE TURN TO THE EVALUATION OF THE COURT OF APPEALS' "CONCEIVABLE BENEFIT TEST. THERE SEEMS TO US TO BE LITTLE DOUBT THAT THIS TEST IS A VIRTUAL "PER SE" RULE WHICH REQUIRES LITTLE IF ANY SHOWING ON THE PART OF THE ACCUSED DEFENDANT THAT THE TESTIMONY OF THE ABSENT WITNESS WOULD HAVE BEEN FAVORABLE OR MATERIAL." "IF EVERYTHING THAT MIGHT INFLUENCE A JURY MUST BE DISCLOSED, THE ONLY WAY A PROSECUTOR COULD DISCHARGE HIS CONSTITUTIONAL DUTY WOULD BE TO ALLOW COMPLETE DISCOVERY OF HIS FILES AS A MATTER OF ROUTINE PRACTICE." UNITED STATES V. AGURS, 427 U.S. 97, 109, 96 S.Ct. 2392, 2400 49 L.Ed.2d 342 (1976).

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ONE OF THE FOUR FACTORS IDENTIFIED BY THE COURT, AND A FACTOR MORE FULLY DISCUSSED IN U.S. V. MAC DONALD, 435 U.S. 850, 858-859, 98 S.CT. 1547, 1551-52, 56 L.Ed.2d 18 (1978), WAS WHETHER THERE HAD BEEN ANY "PREDJUDICE TO THE DEFENDANT FROM THE DELAY." Id., AT 858, 98 S.Ct, at 1551. ALTHOUGH THE COURT RECOGNIZED THAT PREJUDICE MAY TAKE THE FORM OF "'OPPRESSIVE PRETRIAL INCARCERATION'" OR "'ANXIETY AND CONCERN OF THE ACCUSED,' "THE" 'MOST SERIOUS' "CONSIDERATION, ANALOGOUS TO CONSIDERATIONS IN THIS CASE, WAS IMPAIRMENT OF THE ABILITY TO MOUNT A DEFENSE. SEE IBID. (QUOTING BARKO V. WINGO, SUPRA, AT 532, 92 S.CT. AT 2193). THUS, OTHER INTEREST PROTECTED BY THE SIXTH AMENDMENT LOOK TO THE DEGREE OF PREJUDICE INCURRED BY A DEFENDANT 3448 AS A RESULT OF GOVERNMENTAL ACTION OR INACTION.

THE INFORMER WAS THE ONLY WITNESS IN A POSITION TO AMPLIFY OR CONTRADICT THE TESTIMONY OF GOVERMENT WITNESSES. MOREOVER, A GOVERNMENT WITNESS TESTIFIED THAT [THE INFORMER] DENIED KNOWING PETITIONER OR EVER HAVING SEEN HIM BEFORE. WE CONCLUDE THAT, UNDER THESE CIRCUMSTANCES, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING THE GOVERNMENT TO WITHHOLD THE IDENTITY OF ITS UNDERCOVER EMPLOYEE IN THE FACE OF REPEATED [458 U.S. 871] DEMANDS BY THE ACCUSED FOR HIS DISCLOSURE." 353 U.S., AT 64-65, 77 S.Ct., AT 630.

"THE RIGHT TO OFFER THE TESTIMONY OF WITNESSES, AND TO COMPEL THEIR ATTENDANCE, IF NECESSARY, IS IN PLAIN TERMS

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THE RIGHT TO PRESENT A DEFENSE, THE RIGHT TO PRESENT THE DEFENDANT'S VERSION OF THE FACTS AS WELL AS THE PROSECUTION'S TO THE JURY SO IT MAY DECIDE WHERE THE TRUTH LIES." WASHINGTON V. TEXAS, 388 U.S. 14, 19, 87 S.CT. 1920, 1923, 18L. Ed.2d 1019 (1967). IN SHORT, THE RIGHT TO COMPULSORY PROCESS IS ESSENTIAL TO A FAIR TRIAL.' SINCE THE GOVERNMENT WHICH PROSECUTES AN ACCUSED ALSO HAS THE DUTY TO SEE THAT JUSTICE IS DONE, IT IS UNCONSCIONABLE TO ALLOW IT TO UNDERTAKE PROSECUTION AND THEN INVOKE IT'S GOVERNMENTAL PRIVILEGES TO DEPRIVE THE ACCUSED OF ANYTHING WHICH MIGHT BE MATERIAL TO HIS DEFENSE...." Id., AT 671, 77 S. CT, AT 1014-15, QUOTING U.S. V. REYNOLDS, 345 U.S. 1, 12, 73 S.CT 528, 534, 97 L.Ed. 727 (1953). WE ALSO QUOTED (JUSTICE BRENNAN, WITH WHOM JUSTICE MARSHALL JOINS, DISSENTING.) WITH APPROVAL FROM THE OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN U.S. V. ANDOLSCHEK, 142 F.2d 503 (1944) IN WHICH JUDGE LEARNED HAND SAID: "WHILE WE MUST ACCEPT IT AS LAWFUL FOR A DEPARTMENT OF THE GOVERNMENT TO SUPPRESS DOCUMENTS, EVEN WHEN THEY WILL HELP DETERMINE CONTROVERSIES BETWEEN THIRD PERSONS, WE CANNOT AGREE THAT THIS SHOULD INCLUDE THEIR SUPPRESSION IN A CRIMINAL PROSECUTION, FOUNDED UPON THOSE VERY DEALINGS TO WHICH THE DOCUMENTS RELATE, AND WHOSE CRIMINALITY THEY WILL, OR MAY TEND TO EXCULPATE. SO FAR AS THEY DIRECTLY TOUCH THE CRIMINAL DEALINGS, THE PROSECUTION NECESSARILY ENDS ANY CONFIDENTIAL CHARACTER THE DOCUMENTS [458 U.S. 882] MAY POSSESS; IT MUST BE CONDUCTED IN THE OPEN, AND WILL CAY BARE THEIR SUBJECT MATTER THE GOVERNMENT MVST CHOOSE;

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EITHER IT MUST LEAVE THE TRANSACTIONS IN THE OBSCURITY FROM WHICH A TRIAL WILL DRAW THEM, OR IT MUST EXPOSE THEM FULLY." Id., at 506 (FN1), "ROVIARO V. U.S. 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), DENIED THE GOVERNMENT'S CLAIMED PRIVILEGE TO WITHHOLD THE IDENTITY OF IT'S INFORMER, "JOHN DOE," FROM THE PETITIONER. RATHER, THE COURT IN ROVIARO REQUIRED DISCLOSURE SIMPLY BECAUSE JOHN DOE'S TESTIMONY "MIGHT HAVE BEEN HELPFUL TO THE DEFENSE" 353 U.S., AT 63-64, 77 S.CT., AT 629 (EMPHASIS ADDED)." DOE HAD HELPED TO SET UP THE CRIMINAL OCCURRENCE AND HAD PLAYED A PROMINENT PART IN IT. HIS TESTIMONY MIGHT HAVE DISCLOSED AN ENTRAPMENT. HE MIGHT HAVE THROWN DOUBT UPON PETITIONER'S IDENTITY OR THE IDENTITY OF THE PACKAGE [OF HEROIN]. THE DESIRABILITY OF CALLING JOHN DOE AS A WITNESS, OR AT LEAST INTERVIEWING HIM IN PREPARATION FOR TRIAL, WAS A MATTER FOR THE ACCUSED RATHER THAN THE GOVERNMENT TO DECIDE." Id., at 64, 77 S.CT., AT 629, (EMPHASIS ADDED). LIKE DOE IN ROVIARO, THE ILLEGAL ALIENS DEPORTED BY THE GOVERNMENT IN THE PRESENT CASE "PLAYED A PROMINENT PART" IN RESPONDENT'S ALLEGED OFFENSE -- IF, INDEED, THEY DID NOT HELP TO SET IT UP WITHOUT THE KNOWLEDGE OF RESPONDENT. AND THEY, LIKE DOE, MIGHT HAVE TESTIFIED TO RESPONDENT'S "POSSIBLE LACK OF KNOWLEDGE" RESPECTING ESSENTIAL ELEMENTS OF THE CRIME CHARGED AGAINST HIM. (FN4) UNDER ROVIARO, RESPONDENT, NOT THE [458 U.S. 885] GOVERNMENT WAS ENTITLED TO DECIDE WHETHER OR NOT THE ILLEGAL ALIEN EYEWITNESSES IN THIS CASE COULD GIVE TESTIMONY MATERIAL AND RELEVANT

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TO THE DEFENSE, AS DESCRIBED BY THE COURT OF APPEALS (9TH CIR), THE "CONCEIVABLE BENEFIT TEST "IMPOSE[S] NO REQUIREMENT OF GOVERNMENT MISCONDUCT OR NEGLIGENCE BEFORE DISMISSAL OF AN INDICTMENT IS WARRANTED, NOR IS A DEFENDANT REQUIRED TO SHOW SPECIFIC PREDJUDICE CAUSED BY THE UNAVAILABILITY OF THE ALIEN EYE WITNESSES' OTHER COURTS OF APPEALS HAVE RECOGNIZED THE NINTH CIRCUIT RULE AS REQUIRING NO SHOWING OF PREJUDICE, U.S. V. CALZADA, 579 F.2d, AT 1362, AND AS PERMITTING DISMISSAL OF THE INDICTMENT EVEN WHEN THE "RECORD IS COMPLETELY DEVOID OF ANY THING WHICH WOULD SUGGEST THAT THE TESTIMONY OF ANY ONE, OR MORE OF THE DEPORTED PERSONS WOULD HAVE BEEN HELPFUL TO THE DEFENDANTS". U.S. V. AVILA-DOMINGUEZ SUPRA, 610 F.2d, AT 1269-1270 (QUOTING U.S. V. MENDEZ-RODRIGUEZ, 450 F.2d 1, 6 (CA9 1971) KILKENNY, J DISSENTING)).
SEE U.S. V. BURR, 25 F. CAS. 187 (NO. 14,694) (C.C.D.VA. 1807), IN BURR, CHIEF JUSTICE MARSHALL FOUND IT UNREASONABLE TO REQUIRE AARON BURR TO EXPLAIN THE RELEVANCY OF GENERAL WILKINSON'S LETTER TO PRESIDENT JEFFERSON, UPON WHICH THE PRESIDENT'S ALLEGATIONS OF TREASON WERE BASED PRECISELY BECAUSE BURR HAD NEVER READ THE LETTER AND WAS UNAWARE OF ITS CONTENTS. SEE ILLINOIS V. FISHER, 540 U.S. 544, 124 S.CT 1202 (U.S. 2004) WE HAVE HELD THAT WHEN THE STATE SUPPRESSES OR FAILS TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE, THE GOOD OR BAD FAITH OF THE PROSECUTION IS IRRELEVANT; A DUE PROCESS VIOLATION OCCURS WHENEVER SUCH EVIDENCE IS WITHHELD. SEE BRADY V. MARYLAND, 373 U.S. 83, 83 S.CT. 1194, 10 L.Ed.2d

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215 (1963); U.S. V. AGURS, 427 U.S. 97, 96 S.CT. 2392, 49 L.Ed.2d 342 (1976).

SEE U.S. V. VALENZUELA-BERNAL, 458 U.S. 858, 102 S.CT. 3440, (U.S. CAL 1982) (FN1) RESPONDENT WAS FOUND GUILTY *3443 AFTER A BENCH TRIAL, BUT HIS CONVICTION WAS OVER TURNED BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. THAT COURT HELD THAT THE ACTION OF THE GOVERNMENT IN DEPORTING TWO ALIENS OTHER THAN ROMERO-MORALES VIOLATED RESPONDENT'S RIGHT UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO COMPULSORY PROCESS, AND HIS RIGHT UNDER THE FIFTH AMENDMENT TO DUE PROCESS OF LAW. THE COURT OF APPEALS REVERSED THE CONVICTION. THE COURT RELIED UPON THE RULE, FIRST STATED IN UNITED STATES V. MENDEZ-RODRIGUEZ, 450 F. 2d 1 (CA9 1971), THAT THE GOVERNMENT VIOLATES THE FIFTH AND SIXTH AMENDMENTS WHEN IT DEPORTS ALIEN WITNESSES BEFORE DEFENSE COUNSEL HAS AN OPPORTUNITY TO INTERVIEW THEM. 647 F. 2d 72, 73-75 (1981). ALTHOUGH IT STATED THAT A CONSTITUTIONAL VIOLATION OCCURS ONLY WHEN "THE ALIENS TESTIMONY COULD CONCEIVABLY BENIFIT THE DEFENDANT," Id., AT 74, THE COURT'S APPLICATION OF THE "CONCEIVABLE BENEFIT" TEST DEMONSTRATED THAT THE TEST WILL BE SATISFIED WHENEVER THE DEPORTED ALIENS WERE EYEWITNESSES TO THE CRIME. (FN4) RESPONDENT'S [458 U.S. 863] FAILURE TO EXPLAIN WHAT BENIFICIAL EVIDENCE WOULD HAVE BEEN PROVIDED BY THE TWO PASSENGERS WAS THUS INAPPOSITE, FOR "THE DEPORTED ALIENS WERE EYEWITNESSES TO, AND ACTIVE PARTICIPANTS IN, THE CRIME CHARGED, THUS ESTABLISHING A STRONG POSSIBILITY THAT THEY COULD HAVE PROVIDED MATERIAL AND RELEVANT INFORMATION CONCERNING THE EVENTS CONSTITUTING THE CRIME." Id., AT 75, ACCORDINGLY, THE COURT OF APPEALS HELD THAT RESPONDENTS MOTION TO DISMISS

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THE INDICTMENT SHOULD HAVE BEEN GRANTED BY THE DISTRICT COURT.

IN UNITED STATES V. MARION, 404 U.S. 307, 92 S.CT. 455, 30 L.Ed.2d 468 (1971), FOR EXAMPLE, THE COURT HELD THAT PRE-INDICTMENT DELAY CLAIMS WERE GOVERNED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, NOT BY THE SPEEDY-TRIAL GUARANTEE OF THE SIXTH AMENDMENT.

BUT WHEN THE EXECUTIVE BRANCH CHOOSES TO PROSECUTE A VIOLATION OF FEDERAL LAW, IT INCURS A CONSTITUTIONAL RESPONSIBILITY MANIFESTLY SUPERIOR TO IT'S OTHER DUTIES; NAMELY, THE RESPONSIBILITY [458 U.S.88] TO ENSURE THAT THE ACCUSED RECEIVES THE DUE PROCESS OF LAW. THE GOVERNMENT SIMPLY CANNOT BE HEARD TO ARGUE THAT THE CRIMINAL DEFENDANT'S RIGHTS MAY BE INFRINGED BECAUSE OF THE EXECUTIVE BRANCH'S "OTHER RESPONSIBILITIES!" GIVEN THE VAST AND MANIFOLD CHARACTER OF THOSE RESPONSIBILITIES, TO ACCEPT SUCH AN ARGUMENT WOULD BE TO ACCEDE TO THE RAPID EVISCERATION OF THE CONSTITUTIONAL RIGHTS OF THE ACCUSED.; THE COURT RECOGNIZES RESPONDENT'S CONSTITUTIONAL RIGHT, UNDER THE COMPULSORY PROCESS CLAUSE OF THE SIXTH AMENDMENT, TO THE PRODUCTION OF ALL WITNESSES WHOSE TESTIMONY WOULD BE RELEVANT AND MATERIAL TO HIS DEFENSE. ANTE, AT 3446-3448. [458 U.S.880]

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ARGUMENT

THE PRESUMPTION THAT THE STATE COURT DETERMINATIONS OF FACT ARE CORRECT MAY BE RUBUTTED WITH ARGUMENTS THAT THE STATE COURT DID NOT PROPERLY DETERMINE THE FACTS BECAUSE THE PETITIONER WAS PREVENTED FROM PRESENTING EVIDENCE OR HAD INSUFFICIENT OPPORTUNITY TO BE HEARD ON THE MERITS OF THE FACTUAL DISPUTE, SEE JONES V. WOOD (9TH CIR. 1997) 114 F.3d 1002; AND THE FACTS UNDERLYING THE CLAIM WOULD BE SUFFICIENT TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT BUT FOR CONSTITUTIONAL ERROR NO REASONABLE FACTFINDER WOULD HAVE FOUND THE PETITIONER GUILTY. SEE 28 U.S.C § 2254(e)(2); WILLIAMS V. TAYLOR (2000) — U.S. — [120 S.CT 1479; 146 L.Ed 435].

IN ADEQUATE DEFERENCE TO A STATE COURT FINDING SEE SUMNER V. MATA (1983) 464 U.S. 957 [104 S.CT. 386.

IN LIGHT OF CUNNINGHAM V. CALIFORNIA, 75 U.S.L.W. 4078 (U.S. 2007)

THEREFORE, FAA NOTICE THAT SUBJECTED GUIDE PILOTS TO SUCH REGULATIONS WITHOUT NOTICE AND OPPORTUNITY FOR COMMENT WAS INVALID UNDER ADMINISTRATIVE PROCEDURE ACT (APA). ALASKA PROFESSIONAL HUNTER'S ASS'N, INC. V. F.A.A., C.A.D.C. 1999. 177 F.3d 1030, 336 U.S. APP. D.C. 197

ACCUSATIONAL DELAY - TO GAIN UNFAIR TACTICAL ADVANTAGE OVER DEFENDANT - SEE - SPEEDY TRIAL VIOLATION BARKER V. WINGO 407 U.S. 514 (1972)

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ARGUMENT - INEFFECTIVE ASSISTANCE OF APPEALS COUNSEL ON DIRECT REVIEW TO BRING FORTH, THE 14TH U.S. CONST. AMEND. SEARCH AND SEIZURE CLAIMS AND U.S. INSUFFICIENCY OF EVIDENCE, SEE KIMMELMAN V. MORRISON (1986) 477 U.S. 365 [106 S.CT. 2574.] SEE U.S. V CHADWICK, 433 U.S., AT 15, 97 S.Ct., AT 2485 (SEARCH OF FOOTLOCKER "CONDUCTED MORE THAN AN HOUR AFTER FEDERAL AGENTS HAD GAINED EXCLUSIVE CONTROL OF THE FOOTLOCKER AND LONG AFTER RESPONDENTS WERE SECURELY IN CUSTODY" NOT INCIDENT TO ARREST); COOLIDGE V. NEW HAMPSHIRE, 403 U.S., AT 456-457, AND N.11, 91 S.Ct., AT 2032-33, AND N.11 (SEARCH OF CAR IN DRIVEWAY NOT INCIDENT TO ARREST IN HOUSE); "ONCE AN ACCUSED IS UNDER ARREST AND IN CUSTODY, THEN A SEACH MADE AT ANOTHER PLACE, WITHOUT A WARRANT, IS SIMPLY NOT INCIDENT TO THE ARREST." CHAMBERS V. MARONEY, 399 U.S. 42, 47, 90 S.CT. 1975, 1979, 26 L.Ed.2d 419 (1970), QUOTING PRESTON V. U.S., 376 U.S., AT 367, 84 S.Ct., AT 883.; AS WE NOTED IN GO-BART IMPORTING CO. V. U.S., 282 U.S. 344, 357, 51 S.Ct. 153, 158, 75 L.Ed. 374 (1931): "THERE IS NO FORMULA FOR THE DETERMINATION OF REASONABLENESS. EACH CASE IS TO BE DECIDED ON ITS OWN FACTS AND CIRCUMSTANCES." N.Y. V. BELTON, 453 U.S. 454, 101 S.Ct. 2860 (U.S.N.Y. 1981) (FNS) IT SEEMS TO HAVE BEEN THE THEORY OF THE COURT OF APPEALS THAT THE SEARCH AND SEIZURE IN THE PRESENT CASE COULD NOT HAVE BEEN INCIDENT TO THE RESPONDENT'S ARREST, BECAUSE TROOPER NICOT, BY THE VERY ACT OF SEARCHING THE RESPONDENT'S JACKET AND SEIZING THE CONTENTS OF IT'S POCKET, HAD GAINED "EXCLUSIVE CONTROL" OF THEM. 50 N.Y. 2d 447, 451, 429 N.Y.S.2d 574, 576, 407 N.E. 2d 420, 422. IN THE TRIAL COURT HE MOVED THAT THE COCAINE THE TROOPER HAD SEIZED FROM THE JACKET POCKET BE SUPPRESSED. THE COURT DENIED THE MOTION. BELTON THEN PLEADED GUILTY TO A LESSOR INCLUDED OFFENSE, BUT PRESERVED HIS CLAIM THAT THE COCAINE HAD BEEN SEIZED IN VIOLATION OF THE FOURTH AND FOURTEENTH

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AMENDMENTS. SEE LEFKOWITZ V. NEWSOME, 420 U.S. 283, 95 S.CT. 886, 43 L.Ed.2d 196. THE NEW YORK COURT OF APPEALS REVERSED, HOLDING THAT "[A] WARRANTLESS SEARCH OF THE ZIPPERED POCKETS OF AN UNACCESSABLE JACKET MAY NOT BE UPHELD AS A SEARCH INCIDENT TO A LAWFUL ARREST WHERE THERE IS NO LONGER ANY DANGER THAT THE ARRESTEE OR A CONFEDERATE MIGHT GAIN ACCESS TO THE ARTICLE." 50 N.Y.2d 447, 449, 429 N.Y.S.2d 574, 575, 407 N.E.2d. 420, 421. WE GRANTED CERTIORARI TO CONSIDER THE CONSTITUTIONALLY PERMISSIBLE SCOPE OF A SEARCH IN CIRCUMSTANCES SUCH AS THESE. 449 U.S. 1109, 101 S.CT. 917, 66 L.Ed.2d 838. THE COURT'S OPINION IN CHIMEL EMPHASIZED THE PRINCIPLE THAT, AS THE COURT HAD SAID IN TERRY V. OHIO, 392 U.S. 1, 19, 88 S.Ct. 1868, 1878, 20 L.Ed.2d 889, "THE SCOPE OF [A] SEARCH MUST BE 'STRICTLY TIED TO AND JUSTIFIED BY 'THE CIRCUMSTANCES WHICH RENDERED ITS INITIATION PERMISSIBLE.'" QUOTED IN CHIMEL V. CALIFORNIA, SUPRA, AT 762, 89 S.CT., AT 2039. THE NEW YORK COURT OF APPEALS RELIED UPON U.S. V. CHADWICK, 433 U.S. 1, 97 S.Ct 2476, 53 L.Ed.2d 538 AND ARKANSAS *2865 V. SANDERS, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235. SEE U.S. V. ROBINSON, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). THE STATE HAS NOT ARGUED THAT RESPONDENT'S SUITCASE WAS SEARCHED INCIDENT TO HIS ARREST, AND IT APPEARS THAT THE BAG WAS NOT WITHIN HIS 'IMMEDIATE CONTROL' AT THE TIME OF THE SEARCH." 442 U.S. AT 764, N.11, 99 S.Ct., AT 2593, N.11. (THE SUIT CASE IN QUESTION WAS IN THE TRUNK OF THE TAXICAB. SEE N.4, SUPRA.) SEE ALSO MAPP V. OHIO, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); U.S. V. EDWARDS, 415 U.S. 800, 810, 94 S.Ct. 1234, 1240, 39 L.Ed.2d 771 (1974) STEWART, J. DISSENTING, (FN2) WHEN THE ARREST HAS BEEN [453 U.S. 466] CONSUMMATED AND THE ARRESTEE SAFELY TAKEN INTO CUSTODY, THE JUSTIFICATIONS

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IN PROPER UNDERLYING CHIMEL'S LIMITED EXCEPTION TO THE WARRANT REQUIREMENT CEASE TO APPLY; AT THAT POINT THERE IS NO POSSIBILITY THAT THE ARRESTEE COULD REACH WEAPONS OR CONTRABAND. SEE CHIMEL V. CALIFORNIA, SUPRA, AT 764, 89 S. CT., AT 2040, PREDICATED ON THE FOURTH AMENDMENTS ESSENTIAL PURPOSE OF "SHIELD[ING] THE CITIZEN FROM UN WARRANTED INTRUSIONS INTO HIS PRIVACY," JONES V. UNITED STATES, SUPRA, AT 498, 78 S. CT., AT 1256.; VALE V. LOUISIANA, 399 U.S., AT 35, 90 S.CT., AT 1972 (AREA OF IMMEDIATE CONTROL DOES NOT EXTEND TO INSIDE OF HOUSE WHEN SUSPECT IS ARRESTED ON FRONT STEP); DYKE V. TAYLOR IMPLEMENT MFG. CO., 391 U.S., AT 220, 88 S.CT., AT 1474 SEARCH OF CAR AFTER OCCUPANT PLACED IN CUSTODY AND TAKEN TO COURTHOUSE NOT VALID AS INCIDENT TO ARREST). IN ROBBINS V. CALIFORNIA, 453 U.S. 420, 101 S.CT. 2841, 69 L.Ed.2d 744, IT WAS HELD THAT A WRAPPED CONTAINER IN THE TRUNK OF A CAR COULD NOT BE SEARCHED WITHOUT A WARRANT EVEN THOUGH THE TRUNK IT SELF COULD BE SEARCHED WITHOUT A WARRANT BECAUSE THERE WAS PROBABLE CAUSE TO SEARCH THE CONTAINER AS WELL. THIS WAS BECAUSE OF THE SEPARATE INTEREST IN PRIVACY WITH RESPECT TO THE CONTAINER.; FRUIT OF THE POISONOUS TREE; "THE ESSENCE OF A PROVISION FORBIDDING THE ACQUISITION OF EVIDENCE IN A CERTAIN WAY IS THAT NOT MERELY EVIDENCE SO ACQUIRED SHALL NOT BE USED BEFORE THE COURT, BUT IT SHALL NOT BE USED AT ALL". (SILVERTHONE LUMBER CO. V. U.S. (1920) 251 U.S. 385) NOT ONLY IS IT WELL ESTABLISHED THAT EVIDENCE WHICH IS ILLEGALLY OBTAINED CANNOT BE USED

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(ANGELO V. U.S. (1925) 269 U.S. 20), BUT MAPP V. OHIO (1961) 367 U.S. 643 AND WONG-SUN V. UNITED STATES (1963) 371 U.S. 471 INSTRUCT US THAT THE "FRUITS" RESULTING FROM EVIDENCE SEIZED OR LEADS RESULTING FROM THE EVIDENCE MUST ALSO BE EXCLUDED.

CA CAL 1997 PROXIMITY BETWEEN HOME AND AREA PURPORTEDLY WITHIN CURTILAGE PROTECTED BY FOURTH AMENDMENT IS NOT DETERMATIVE, AS THERE IS NO FIXED DISTANCE AT WHICH CURTILAGE BEGINS OR ENDS, U.S.C.A. AMEND 4. U.S. V. SOLIZ 129 F.3d 499.

CA CAL 1997 FOURTH AMENDMENT PROTECTS CURTILAGE OF HOME AND EXTENT CURTILAGE IS DETERMIND BY WHETHER INDIVIDUAL MAY REASONABLY EXPECT THAT AREA IN QUESTION SHOULD BE TREATED AS HOME ITSELF. U.S.C.A. CONST. AMEND 4. U.S. V. SOLIZ 129 F3d 499.

POLICE OFFICER IS PERMITTED TO ARREST WITHOUT WARRANT IF MISDEAMEANOR OR FELONY IS COMMITTED IN OFFICER'S PRESENCE. HIGBEE V. CITY OF SAN DIEGO, CA. 911 F.2d 377

US CAL 1963 - EVIDENCE SEIZED DURING UNLAWFUL SEARCH CANNOT CONSTITUTE PROOF AGAINST VICTIM OF SEARCH, AND EXCLUSIONARY PROHIBITION EXTENDS TO INDIRECT AS WELL AS TO DIRECT PRODUCTS OF SUCH INVASIONS, WONG SUN V. U.S. 83 S.CT 407.

US CAL 1963 - VERBAL EVIDENCE WHICH DERIVES IMMEDIATELY FROM UNLAWFUL ENTRY AND UNAUTHORIZED ARREST, IS NO LESS THE "FRUIT OF OFFICIAL ILLEGALITY THAN MORE COMMON TANGIBLE FRUITS OF UNWARRANTED INTRUSION AND 4TH AMEND MAY PROTECT AGAINST OVER HEARING OF VERBAL STATEMENT AS WELL AS AGAINST MORE TRADITIONAL SEIZURE OF PAPERS AND EFFECTS

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FED. RULES. CRIM. PROC. RULES 3, 4, 18 U.S.CA; US CONST AMEND 4. WONG SUN 83 S.CT. 407.

INFORMATION TOO VAGUE AND FROM UNTESTED SOURCE TO PERMIT JUDICIAL OFFICER TO ACCEPT IT AS PROBABLE CAUSE, FOR ARREST WARRANT IS INSUFFICIENT INFORMATION UPON WHICH TO BASE ARREST WITHOUT WARRANT FED. RULES. CRIM. PROC. RULES 3, 4, 18 U.S.C.A.; U.S.C.A. CONST. AMEND 4. WONG SUN V. U.S. 83 S.CT. 407." (CA 9 CAL 2000) GOVERNMENT FAILED TO SHOW THAT CONNECTION BETWEEN UNLAWFUL TRAFFIC STOP AND SEARCH OF CAR WAS SUFFICIENTLY ATTENUATED TO DISSIPATE THE TAINT CAUSED BY THE ILLEGALITY, AND THUS COCAINE SEIZED IN SEARCH SHOULD HAVE BEEN SUPPRESSED AS "FRUIT OF THE POISONOUS TREE". U.S. 4 AMENDT. U.S. V. FOPPE 993 F. 2d 1444 (CA CAL 2000) THERE IS NO GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE FOR POLICE WHO DO NOT ACT IN ACCORDANCE WITH GOVERNING LAW. U.S.C.A CONST. AMENDT. 4, U.S. V. TWILLEY 232 F. 3d 1092. SEE KATZ V. U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967), THE CRITICAL FACT IN THIS CASE IS THAT "[O]NE WHO OCCUPIES IT [A TELEPHONE BOOTH] SHUTS THE DOOR BEHIND HIM, AND PAYS THE TOLL THAT PERMITS HIM TO PLACE A CALL, IS SURELY ENTITLED TO ASSUME" THAT HIS CONVERSATION IS NOT BEING INTERCEPTED. THE POINT IS NOT THAT THE BOOTH IS "ACCESSIBLE TO THE PUBLIC" AT OTHER TIMES BUT THAT IT IS A TEMPORARY PRIVATE PLACE WHOSE MOMENTARY OCCUPANT'S EXPECTATIONS OF FREEDOM FROM INTRUSION ARE RECOGNIZED AS REASONABLE.

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ARREST 63.5(9)
INVESTIGATIVE DETENTION MUST BE TEMPORARY AND LAST NO LONGER THAN IS NECESSARY TO EFFECTUATE PURPOSE OF STOP, AND SIMILARLY, INVESTIGATIVE METHODS EMPLOYED SHOULD BE THE LEAST INTRUSIVE MEANS REASONABLY AVAILABLE TO VERIFY OR DISPEL OFFICER'S SUSPICION IN SHORT PERIOD OF TIME. U.S.C.A. CONST. AMEND 4.
U.S. CAL 1975, BECAUSE OF IMPORTANCE OF GOVERNMENTAL INTEREST IN COMBATING ILLEGAL ENTRY OF ALIENS AT THE BORDER THE MINIMUL INTRUSION OF A BRIEF STOP, AND THE ABSENCE OF PRACTICAL ALTERNATIVE FOR POLICING THE BORDER, WHEN AN OFFICER'S OBSERVATIONS LEAD HIM REASONABLY TO SUSPECT THAT A PARTICULAR VEHICLE MAY CONTAIN ALIENS WHO ARE ILLEGALLY IN THE UNITED STATES, HE MAY STOP THE CAR BRIEFLY AND INVESTIGATE THE CIRCUMSTANCES THAT PROVOKE SUSPICION BUT THE STOP AND INQUIRY MUST BE REASONABLY RELATED IN SCOPE TO THE JUSTIFICATION FOR THEIR INITIATION AND THE OFFICER MAY QUESTION THE DRIVER AND PASSENGERS ABOUT THEIR CITIZENSHIP AND IMMIGRATION STATUS, AND HE MAY ASK THEM TO EXPLAIN SUSPICIOUS CIRCUMSTANCES, BUT ANY FURTHER DETENTION OR SEARCH MUST BE BASED ON CONSENT OR PROBABLE CAUSE. IMMIGRATION AND NATIONALITY ACT § 274(A)(2), 8 U.S.C.A. § 1324(a)(2) U.S.C.A. CONST. AMEND 4. U.S.C.A. 4
U.S. V. BRIGNONI PONCE 95 S.CT. 2574, 422 U.S. 873, 45 L.Ed.2d 607.
U.S. CAL 1963. INFORMATION TOO VAGUE AND FROM TO UNTESTED A SOURCE TO PERMIT JUDICIAL OFFICER TO ACCEPT IT AS PROBABLE CAUSE FOR ARREST WARRANT IS INSUFFICIENT INFORMATION UPON WHICH TO BASE ARREST WITHOUT WARRANT. FED. RULES. CRIM. PROC, RULES 3, 4, 18 U.S.C.A., U.S.C.A CONST. AMEND 4. WONG SUN V. U. S,
CA. 9 CAL 2000 GOVERNMENT FAILED TO SHOW THAT CONNECTION BETWEEN UNLAWFUL TRAFFIC STOP AND SEARCH OF CAR WAS SUFFICIENTLY ATTENUATED TO DISSIPATE THE TAINT CAUSED BY THE ILLEGALITY, AND THUS COCAINE SEIZED IN SEARCH SHOULD HAVE BEEN SUPPRESSED AS "FRUIT OF THE POISONOUS TREE", WHERE AFTER STOPPING CAR OFFICER NOTICED DEFENDANT LYING IN BACK SEAT WITHOUT SEAT BELT, OFFICER CONTINUED TO QUESTION OCCUPANTS OF CAR EVEN AFTER BEING INFORMED THAT SINGLE LICENSE

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ARGUMENT

COMPLAINT STATED A CLAIM AGAINST SHERIFF'S OFFICERS FOR VIOLATION OF PLAINTIFFS FOURTH AMENDMENT RIGHT TO BE FREE FROM UNLAWFUL SEIZURE OF HER PERSON, WHERE PLAINTIFF ALLEDGED THAT OFFICER REFUSED TO IDENTIFY HIMSELF, WOULD NOT INFORM PLAINTIFF OF THE REASON SHE WAS BEING ARRESTED, AND DID NOT ALLOW PLAINTIFF TO EXPLAIN HER SIDE OF THE STORY PRIOR TO ARRESTING HER FOR MISDEMEANOR BATTERY, THUS RAISING AN INFERENCE THAT THE OFFICER'S ARRESTED PLAINTIFF BASED ON COMPLAINTS OF THE UNEXAMINED CHARGE. U.S. CONST. AMEND. 4 ARPIN V. SANTA CLARA VALLEY TRANPS. AGENCY, 261 F.3d 912 (9TH CIR. 2001) FOURTH AMENDMENT PROTECTIONS APPLY WHEN "OFFICIAL AUTHORITY" IS EXCERCISED "SUCH THAT A REASONABLE PERSON WOULD HAVE BELIEVED HE WAS NOT FREE TO LEAVE." ANTE, AT 1326, QUOTING 446 U.S. AT 554, 100 S.CT. AT 1877. I DO NOT QUARREL WITH THE PLURALITY'S CONCLUSION THAT AT SOME POINT IN THIS ENCOUNTER, THAT THRESHOLD WAS PASSED. I ALSO AGREE THAT THE INFORMATION AVAILABLE PRIOR TO THE OPENING OF ROWE'S SUITCASE, DID NOT CONSTITUTE PROBABLE CAUSE TO ARREST, THUS IF PROBABLE CAUSE WAS REQUIRED, THE SEIZURE WAS ILLEGAL AND THE RESULTING CONSENT TO SEARCH WAS INVALID. DUNAWAY V. NEW YORK 442 U.S. 200, 216-219, 99 S.Ct 2248, 2258-2260, 60 L.Ed.2d 824 (1979), BROWN V. ILLINOIS, 422 U.S. 590, 601-604, 95 S.Ct. 2254, 2260-2262, 45 L.Ed.2d 416 (1975)

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IN THE NAME OF INVESTIGATING PERSON WHO IS NO MORE THAN SUSPECTED OF CRIMINAL ACTIVITY, POLICE MAY NOT CARRY OUT FULL SEARCH OF PERSON OR OF HIS AUTOMOBILE OR OTHER EFFECTS, NOR MAY POLICE SEEK TO VERIFY THEIR SUSPICIONS BY MEANS THAT APPROACH THE CONDITIONS OF ARREST U.S.C.A. CONST. AMEND. 4, REASONABLE SUSPICION OF CRIME IS INSUFFICIENT TO JUSTIFY CUSTODIAL INTERROGATION, EVEN IF INTERROGATION IS INVESTIGATIVE. U.S.C.A. CONST. AMEND 4.

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ARGUMENT-

THE FIFTH AMENDMENT REQUIREMENTS OF ESTELLE IN WHICH THE SUPREME COURT HELD THAT A DEFENDANT HAS A FIFTH AMENDMENT RIGHT TO BE INFORMED THAT HE NEED NOT CONSENT TO A COURT-ORDERED PSYCHIATRIC EXAMINATION IN WHICH THE RESULTS COULD BE USED AGAINST HIM AT TRIAL U.S.C.A. CONST. AMENDS. 5, 6, MURTISHAW V. WOODFORD, 255 F3d 926 (9TH CIR. 2001), THE U.S. CONSTITUTION GUARANTEES A CRIMINAL DEFENDANT THE RIGHT TO COUNSEL AT ALL CRITICAL STAGES OF HIS CASE. GIDEON V. WAINRIGHT (1963) 372 U.S. 335, 344-345, 83 S.CT. 792, 9L.Ed 2d 799.

THE U.S. SUPREME COURT HAS REVERSED SEVERAL CASES IN WHICH A WRIT HAD ISSUED ON GROUNDS OF INADEQUATE DIFFERENCE TO A STATE COURT FINDING OF FACT. SEE RUSHEN V. SPAIN (1983) 464 U.S. 114 [104 S.CT. 453; 78 L.Ed.2d 267] MAGGIO V. FULFORD (1983) 462 U.S. 111 [103 S.CT. 2261; 76 L.Ed.2d 794] SEE ALSO MARSHALL V. LONBERGER (1983) 459 U.S. 422 [103 S. CT. 843; 74 L.Ed.2d 646] SEE DISSENT OF JUSTICE STEVENS, SUMMER V. MATA (1982) 455 U.S. 591, 601 [102 S.CT. 1303; 71 L.Ed.2d 480] SEE LAVE V. NELSON (N.D. CAL. 1968) 279 F. SUPP. 265

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ARGUMENT - IN SUPPORT OF CONTENTION OF ABSENCE OF COUNSEL SEE U.S. V. CRONIC (1984) 466 U.S. 648, 104 S.CT. 2039, 80 L.Ed.2d 657; JAVOR V. UNITED STATES CITE AS 724 F.2d 831 (1984): WHEN A DEFENDANT'S ATTORNEY IS ASLEEP DURING A SUBSTANTIAL PORTION OF HIS TRIAL, THE DEFENDANT HAS NOT RECEIVED THE LEGAL ASSISTANCE NECESSARY TO DEFEND HIS INTERESTS AT TRIAL. IN JAVORS CASE, HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED IN THAT HE HAD "NO" ASSISTANCE DURING A SUBSTANTIAL PORTION OF HIS TRIAL, AS THE COURT REALIZED IN COOPER V. FITZ HARRIS, 586 F.2d AT 1332 (QUOTING Holloway V. ARKANSAS, 435 U.S. AT 490, 491, 98 S.CT. AT 1181, 1182) PREDJUDICE IS INHERENT IN THIS CASE BECAUSE UNCONSCIOUS OR SLEEPING COUNSEL IS EQUIVALENT TO NO COUNSEL AT ALL. THE MERE PHYSICAL PRESENCE OF AN ATTORNEY DOES NOT FULFILL THE SIXTH AMENDMENT ENTITLEMENT TO THE ASSISTANCE OF COUNSEL, HOLLOWAY V. ARKANSAS, 435 U.S. AT 489, 98 S.CT. AT 1181, PARTICULARLY WHEN THE CLIENT CANNOT CONSULT WITH HIS OR HER ATTORNEY OR RECEIVE INFORMED GUIDANCE FROM HIM OR HER DURING THE COURSE OF THE TRIAL. GEDERS V. UNITED STATES, 425 U.S. 80, 88-89, 96 S.CT. 1330, 1335-1336, 47 L.Ed.2d 592 (1976) SEE ALSO PEOPLE V. ZAMMORA, 66 CAL. APP. 2d 166, 234-37 152 P.2d 180, 211-15 (1944). (COUNSEL AND DEFENDANTS SEATED SEPARATELY, MAKING CONSULTATION IMPOSSIBLE); STATE V. KELLER, 57 N.D. 645, 223 N.W. 698, 64 A.L.R. 434 (1929) (COUNSEL INTOXICATED TO SUCH AN EXTENT THAT HE DID NOT KNOW WHAT WAS TRANSPIRING AT ALL TIMES IN THE COURTROOM). THE PREDJUDICE INHERENT IN JAVOR'S COUNSEL'S ACTION IS WELL ILLUSTRATED BY CONSIDERING THE ONGOING CONSULTATION ORDINARILY REQUIRED IN THE COURSE OF A CRIMINAL TRIAL.

GENERALLY AN ATTORNEY AND CLIENT NEED TO CONFER ABOUT THE TESTIMONY OR EVIDENCE ADDUCED AT TRIAL AND, TOGETHER EVALUATE IT'S IMPACT. GEDERS V. UNITED STATES, 425, U.S. AT 88, 96 S.CT. AT. 335; PEOPLE V. ZAMMORA, 66 CAL. APP. 2d AT 234, 152 P.2d AT 214-15. MOREOVER A TRIAL ATTORNEY MUST BE PRESENT AND ATTENTIVE IN ORDER TO ADEQUATELY TEST THE CREDIBILITY OF WITNESSES ON CROSS-EXAMINATION A MATTER OF CONSTITUTIONAL IMPORTANCE. U.S. CONST. AMEND VI CONFRONTATION CLAUSE), SEE CHAMBERS V. MISSISSIPPI, 410 U.S. 284, 294-95, 93 S.CT. 1038-1045-46, 35 L.Ed.2d 297 (1973); UNITED STATES V. TUCKER, 716 F 2d 576, 585-86 (9TH CIR. 1983); PEOPLE V. MANSON, 61 CAL. APP. 3d 102, 197-201, 132 CAL. RPTR. 265, 323-27 (1976) CERT. DENIED 430 U.S. 986, 97 S.CT. 1686, 52 L.Ed.2d 382 (1977); WHITE V. STATE, 414 N.E.2d 973, 975-76 (IND. APP. 1981).

TODAY WE CONCLUDE THAT WHEN AN ATTORNEY FOR A CRIMINAL DEFENDANT SLEEPS THROUGH A SUBSTANTIAL PORTION OF THE TRIAL, SUCH CONDUCT IS INHERENTLY PREDJUDICIAL AND THUS NO SEPARATE SHOWING OF PREDJUDICE IS NECESSARY. SEE HOLLOWAY V. ARKANSAS, 435 U.S. 475-489-91, 98 S.CT. 1173, 1181-82, 55 L.Ed.2d 426 (1978); cf RINKER V. COUNTY OF NAPA, 724 F.2d 1352 AT 1354 (9TH CIR. 1983) PER CURIAM) JAVORS SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED NOT BECAUSE OF SPECIFIC LEGAL ERRORS OR OMISSIONS INDICATING INCOMPETENCE, BUT BECAUSE HE HAD "NO" LEGAL ASSISTANCE DURING A SUBSTANTIAL PORTION OF HIS TRIAL. THE MAGISTRATES FINDING OF NO ACTUAL PREDJUDICE IS NOT CONTROLLING BECAUSE REGARDLESS OF COUNSEL'S PARTICIPATION WHEN PRESENT, WHEN A DEFENDANT IS TRIED IN THE PARTIAL ABSENCE OF COUNSEL, HE IS PREDJUDICED AS A MATTER OF LAW Id. CRIMINAL LAW 641.1 MERE PHYSICAL PRESENCE OF AN ATTORNEY DOES NOT FULFILL THE SIXTH AMENDMENT ENTITLEMENT TO ASSISTANCE OF COUNSEL. U.S.CA. CONST. AMEND 6.

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ARGUMENT

SEE CRIMINAL LAW 641.13(2), 1166.11 - CONDUCT OF DEFENDANT'S ATTORNEY WHO SLEPT THROUGH SUBSTANTIAL PORTION OF TRIAL WAS INHERENTLY PREDJUDICIAL AND THUS NO SEPARATE SHOWING OF PREDJUDICE WAS NECESSARY FOR REVERSAL OF DEFENDANTS CONVICTION; DEFENDANTS SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED NOT BECAUSE OF SPECIFIC LEGAL ERRORS OR OMISSIONS INDICATING INCOMPETENCE, BUT RATHER, BECAUSE HE HAD NO LEGAL ASSISTANCE DURING A SUBSTANTIAL PORTION OF HIS TRIAL, U.S. C.A. CONST. AMEND 6.

EDDIE G. JAVOR, PETITIONER - CITE AS 724 F.2d 831 (1984) PETITIONER APPEALED FROM JUDGEMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, LAWRENCE T. LYDICK, J. DENYING HIS PETITION FOR WRIT OF HABEAS CORPUS. THE COURT OF APPEALS, FERGUSON, CIRCUIT JUDGE HELD THAT CONDUCT OF DEFENSE COUNSEL WHO SLEPT THROUGH SUBSTANTIAL PORTION OF THE TRIAL WAS INHERENTLY PREDJUDICE AND THUS NO SEPARATE SHOWING OF PREDJUDICE WAS NECESSARY. (REVERSED)

(QUOTING HOLLOWAY V. ARKANSAS, 435 U.S. AT 490, 491, 98 S.CT. AT 1181, 1182) AN INQUIRY INTO THE QUESTION OF PREDJUDICE WOULD REQUIRE "UNGUIDED SPECULATION" AND WOULD NOT BE SUSCEPTIBLE TO INTELLIGENT, EVEN HANDED APPLICATION" BECAUSE AN ATTORNEY'S ABSENCE PREDJUDICES A DEFENDANT MORE BY WHAT WAS NOT DONE, THAN BY WHAT WAS DONE. SEE CRIMINAL LAW 641.13(1). RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS RECOGNIZED, NOT FOR IT'S OWN SAKE BUT BECAUSE OF THE EFFECT IT HAS ON THE ABILITY OF THE ACCUSED TO RECEIVE A FAIR TRIAL U.S.C.A. CONST. AMEND. 6.; IN JAVOR V. U.S. (TEAS 724 F.2d 831 (1984) JAVOR HAD ALREADY SERVED HIS SENTENCE, HOWEVER HIS PETITION WAS NOT MOOT AS THE COLLATERAL CONSEQUENCES OF HIS CONVICTION FOR SALE AND POSSESSION OF HEROIN PERSISTED, PENNSYLVANIA V. MIMMS, 434 U.S. 106, 108.3, 98 S.CT. 330, 332 N.3, 54 L.Ed.2d 331 (1977)

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ARGUMENT

HOLME V. SOUTH CAROLINA (2006) 126 S.CT. 1727, 547 U.S., 319, 164 L.Ed.2d. 503, 74 USLW 4221 HOLDING; THE UNITED STATES SUPREME COURT JUSTICE ALITO, HELD THAT EXCLUSION OF DEFENSE EVIDENCE THIRD PARTY GUILT DENIED (e.g. TESTIMONY BY MR. HELSEL AT 1538.5 HEARING THAT ALLEGED CO-DEFENDANT WAS IN DEFENDANTS APARTMENT AND NOT PETITIONER AT TIME OF ARRIVAL OF POLICE WITH DOOR CLOSED, INFORMATION WITHHELD FROM THE JURY) DEFENDANT OF A FAIR TRIAL, ABROGATING STATE V. GAY, 343 S.C. 543, 541 S.E.2d 541 VACATED AND REMANDED

WHILE (ALLEGED) PRIOR OFFENSE EVIDENCE MAY IN A PROPER CASE BE ADMISSIBLE FOR IMPEACHMENT EVEN IF FOR NO OTHER PURPOSE, THERE WAS NO JUSTIFICATION FOR ADMITTING (HEARSAY) EVIDENCE FOR IMPEACHMENT PURPOSES AND CONSEQUENTLY NO BASIS FOR DISTRICT COURT'S SUGGESTION THAT JURORS COULD CONSIDER THE (ALLEGED) PRIOR CONVICTIONS AS IMPEACHMENT EVIDENCE WHERE DEFENDANT DID NOT TESTIFY AT TRIAL - FED. RULES EVID RULE 609, 28 USCA. CRIMINAL LAW K 309.1 AFTER AN INDICTMENT HAS BEEN RETURNED AND CRIMINAL PROCEEDINGS ARE UNDER WAY, THE INDICTMENT'S CHARGES MAY NOT BE BROADENED BY AMENDMENT, EITHER LITERAL OR CONSTRUCTIVE, EXCEPT BY THE GRAND JURY ITSELF U.S. V. ADAMSON, 291 F.3d 606 (9TH CIR. 2002)

RULING PURSUANT TO RULE 50(E) (1) OF F.R.C.P. ON PARTY'S MOTION FOR NEW TRIAL.

139 ALR 340 RIGHT OF TRIAL COURT TO GRANT NEW TRIAL AS AFFECTED BY APPELLATE PROCEEDINGS.

53 ALR, FED 558 INDEPENDENT ACTIONS TO OBTAIN RELIEF FROM JUDGEMENT ORDER OR PROCEEDING UNDER RULE 60(B) OF THE FEDERAL RULES OF CIVIL PROCEEDURE,

4 WEST FEDERAL FORM § 4845, MOTION FOR PARTIAL NEW TRIAL,

FEDERAL PROCEDURAL FORMS § 1:1631, AFFIDAUTT-SUPPORTING MOTION FOR RELIEF FROM JUDGEMENT-NEWLY DISCOVERED EVIDENCE [FED. R. CIV. PROC. 60(B)(2)]

FEDERAL PROCEDURAL FORMS § 1:1676, PROCEDURAL GUIDE - MOTION FOR NEW TRIAL

FEDERAL PROCEDURAL FORMS § 1:1681, PROCEDURAL GUIDE ALTERNATIVES TO NEW TRIAL

4 WEST'S FEDERAL FORMS § 4841 - MOTION FOR NEW TRIAL WITH STATEMENT OF GROUNDS,

A.M. JUR. 2d FEDERAL COURTS § 206, HOW TO APPEAL TO DISTRICT COURT

TRANSCRIPTS OF EVIDENTIARY HEARINGS IN LOWER COURTS ARE AVAILABLE TO INDIGENT PETITIONERS FREE OF CHARGE, SEE GARDNER V. CALIFORNIA (1969) 393 U.S. 367 [89 S. CT. 580; 21 L. Ed. 2d 601].

F.O.I.A.

11-9-04:

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ARGUMENT

IN FARETTA V. CALIFORNIA, SUPRA, 422 U.S. AT P. 836 [95 S.CT. AT P. 2541, 9 L.Ed.2d 799], THE UNITED STATES SUPREME COURT HELD THAT A DEFENDANT IN A STATE CRIMINAL TRIAL HAS A FEDERAL CONSTITUTIONAL RIGHT UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO REPRESENT HIMSELF WITHOUT COUNSEL IF HE VOLUNTARILY AND INTELLIGENTLY CHOOSES TO DO SO. THAT RIGHT IS AMONG THOSE "BASIC TO OUR ADVERSARY SYSTEM OF CRIMINAL JUSTICE," AS MUCH A PART OF DUE PROCESS OF LAW AS THE ACCUSED'S RIGHT TO NOTICE OF THE CHARGES, THE RIGHT TO CALL WITNESSES AND TO CONFRONT WITNESSES AGAINST HIM. (Id. AT P. 818.) EVEN THOUGH THE DEFENDANT'S CHOICE MAY WORK TO HIS DETRIMENT, IT IS A CHOICE WHICH MUST BE HONORED OUT OF "'THAT RESPECT FOR THE INDIVIDUAL WHICH IS THE LIFEBLOOD OF THE LAW.'" (Id. AT P. 834, QUOTING ILLINOIS V. ALLEN (1970) 397 U.S. 337, 350-351 [90 S.CT. 1057, 1064, 25 L.Ed.2d 353] (BRENNAN, J., CONC.).) SEE PEOPLE V. JOSEPH (CAL. 1983), 196 CAL.RPTR. 339, 34 CAL.3d 936, 'COULD AN ERRONEOUS DENIAL OF DEFENDANT'S SELF REPRESENTATION RIGHT EVER BE DEEMED A HARMLESS ERROR? THE MAJORITY CONCLUDES NOT, HOLDING THAT AN IMPROPER DENIAL OF A FARETTA RIGHT IS REVERSIBLE PER SE. I ACKNOWLEDGE THAT SEVERAL STATE AND FEDERAL CASES (CITED BY THE MAJORITY) SO HOLD. NEVERTHELESS, I OBSERVE THAT THE UNITED STATES SUPREME COURT HAS NOT YET EXPRESSLY DECIDED THE POINT (SEE FARETTA, SUPRA, 422 U.S. AT P. 852, 95 S.CT. AT P. 2549 [DIS. OPN. OF BLACKMUN, J.

2d 378, 484-485, (1981); Minnick v. Mississippi, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed.2d (1990)).

VI

ONCE A DEFENDANT'S RIGHT TO COUNSEL HAS ATTACHED, STATEMENTS MADE BY THE DEFENDANT ARE NOT ADMISSIBLE IF DELIBERATELY ELICITED BY AUTHORITIES IN THE ABSENCE OF COUNSEL, UNLESS THERE IS A WAIVER OF COUNSEL

The Sixth Amendment right to counsel is offense specific and prohibits police interrogation regarding the specific offense to which the right to counsel has attached. (McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991))

Once a defendant's right to counsel has attached, any subsequent police interrogation in the absence of counsel is inadmissible unless the defendant has initiated the communication. Additionally, the defendant need not be in custody at the time the statement is "deliberately elicited" in order for the Sixth Amendment protection to make the statement inadmissible. (Michigan v. Jackson, 475 U.S. 625, 636, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986); Patterson v. Illinois, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988))

VII

THE BURDEN IS ON THE PROSECUTION TO ESTABLISH THAT A DEFENDANT'S WAIVER OF HIS MIRANDA RIGHTS WAS MADE VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY

Even if the requisite warnings are given, any statement obtained is inadmissible unless the prosecution meets a "heavy burden : . .to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination." (Miranda v. Arizona, supra)

A defendant may waive his or her Miranda rights, provided the waiver is made voluntarily, knowingly, and intelligently, (Miranda v. Arizona, supra)

The determination of whether a waiver is "voluntary" is a separate determination from the question whether a waiver is "knowing" and "intelligent." The court must decide (1) whether the defendant made a free and deliberate choice to waive his rights and was not compelled to do so through police intimidation; and (2) whether the defendant waived his rights with full awareness both

"[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." (Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994)) The test is "how a reasonable man in the suspect's position would have understood his situation." (Berkemer v. McCarty, 468 U.S. 420, 442, 104 S. Ct. 3138, 8 L. Ed. 2d 317 (1984))

IV

AN INTERROGATION WITHIN THE MEANING OF MIRANDA IS ANY ACTION ON THE PART OF AUTHORITIES REASONABLY LIKELY TO ELICIT AN INCRIMINATING RESPONSE

In Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297, 301 (1980), the United States Supreme Court defined "interrogation" within the meaning of Miranda as follows:

> "[I]nterrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Whether a particular form of questioning amounts to an interrogation depends on the total situation, including the length, place and time of questioning, nature of the questions, conduct of the police, and any other relevant circumstances. (People v. Terry, 2 Cal. 3d 362, 383, 85 Cal. Rptr. 409, 466 P.2d 961 (1970))

V

AN ACCUSED WHO HAS INVOKED HIS RIGHT TO COUNSEL, MAY NOT BE SUBJECTED TO FURTHER INTERROGATION UNLESS THE ACCUSED INITIATES FURTHER COMMUNICATION

The United States Supreme Court has made it clear that an accused person who invokes his Fifth Amendment right to have counsel present during a custodial interrogation may not be subjected to further interrogation by authorities without the presence of counsel, unless the accused initiates further communication with the police (Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed 2d 378, 484-485 (1981)

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ARGUMENT

THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT BROKE RANKS WITH SIX OTHER CIRCUITS AND HELD AUG. 9, 2007 THAT A DEFENDANT'S (ALLEGED) PRIOR CONVICTION FOR POSSESSION OF A SAWED-OFF SHOTGUN CANNOT SERVE AS A PREDICATE "VIOLENT FELONY" FOR PURPOSES OF A SENTENCING ENHANCEMENT PROVIDED BY THE FEDERAL ARMED CAREER CRIMINAL ACT (UNITED STATES V. AMOS, 6TH CIR., NO. 06-5032, 8/9/07). THE COURT REASONED THAT MERELY POSSESSING SUCH A WEAPON DOES NOT INVARIABLY POSE "A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY TO ANOTHER." IN AN OPINION BY JUDGE BOYCE F. MARTIN JR., THE SIXTH CIRCUIT SAID IT WAS NOT CONVINCED THAT MERE POSSESSION OF A SAWED-OFF SHOTGUN COULD EVER POSE A SERIOUS POTENTIAL RISK OF HARM TO OTHERS. "AS WITH ANY GUN, SHOOTING A SAWED-OFF SHOTGUN CAN OBVIOUSLY CREATE A SERIOUS RISK OF PHYSICAL HARM TO ANOTHER, BUT THE SAME CAN HARDLY BE SAID FOR THEIR MERE POSSESSION," THE COURT SAID. THE COURT RECOGNIZED THAT "[A]LL OF OUR NATION'S GUN CONTROL LAWS ARE SERIOUS AND ARE INTENDED TO PROMOTE THE SAFETY OF OUR CITIZENRY," BUT IT SAID, "THE IMPORTANT GOALS BEHIND STATUTES DIRECTED AT GUN POSSESSION DO NOT AUTOMATICALLY CONVERT VIOLATIONS OF THEIR REQUIREMENTS INTO 'CRIMES OF VIOLENCE.'"

CIRCUIT SPLIT. ALONG THE WAY, THE COURT REJECTED THE WEIGHT OF AUTHORITY FROM OTHER CIRCUITS. THE FIRST, FOURTH, FIFTH, SEVENTH, EIGHTH, AND NINTH CIRCUITS HAVE HELD EITHER THAT MERE POSSESSION OF A SAWED-OFF SHOTGUN IS A "CRIME OF VIOLENCE" UNDER THE U.S. SENTENCING GUIDELINES OR THAT IT IS A "VIOLENT FELONY" UNDER THE ACCA.

THE SIXTH CIRCUIT FOUND THOSE RULINGS INCONSISTENT WITH DECISIONS FROM THE SAME COURTS HOLDING THAT A VIOLATION OF THE FEDERAL FELON-IN-POSSESSION STATUTE IS NOT A CRIME OF VIOLENCE. FOR EXAMPLE, IN U.S. V. DOE, 960 F.

2d. 221 (1st. CIR. 1992) THE FIRST CIRCUIT NOTED THAT IT IS HARD "TO IMAGINE SUCH A RISK OF PHYSICAL HARM OFTEN ACCOMPANYING THE CONDUCT THAT NORMALLY CONSTITUTES FIREARM POSSESSION, FOR SIMPLE POSSESSION ... TAKES PLACE IN VARIETY OF WAYS... MANY, PERHAPS MOST, OF WHICH DO NOT INVOLVE LIKELY ACCOMPANYING VIOLENCE".

NO AFFIRMATIVE, ACTIVE CONDUCT. THE SIXTH CIRCUIT POINTED OUT THAT IT EMPLOYED SIMILAR REASONING IN UNITED STATES V. FLORES, 477 F.3d 431 (6TH. CIR. 2007), WHERE IT HELD THAT MERELY CARRYING A CONCEALED WEAPON IS NOT A VIOLENT FELONY. THE FLORES COURT RECOGNIZED THAT THE CRIMES EXPLICITLY LISTED IN SECTION 924(e), INCLUDING BURGLARY, ARSON, EXTORTION, AND USE OF EXPLOSIVES, "INVOLVE[] AFFIRMATIVE AND ACTIVE CONDUCT THAT IS NOT INHERENT IN THE CRIME OF CARRYING A CONCEALED WEAPON." MERELY POSSESSING A SAWED-OFF SHOTGUN SIMILARLY DOES NOT INVOLVE AFFIRMATIVE AND ACTIVE CONDUCT, THE COURT SAID. IT ADDED THAT CARRYING A CONCEALED WEAPON SURELY HOLDS A GREATER POTENTIAL FOR DANGER THAN MERELY POSSESSING A SAWED-OFF SHOTGUN. THE COURT ALSO WAS NOT CONVINCED "THAT THE POTENTIAL FOR FUTURE DANGEROUSNESS OR LACK OF A LEGITIMATE USE FOR SAWED-OFF SHOTGUNS THAT OTHER CIRCUITS HAVE POINTED TO RENDERS THEIR POSSESSION A VIOLENT FELONY."

JUDGE ALICE M. BATCHELDER, CONCURRING, ADDED THAT THE COURT'S HOLDING WAS REINFORCED BY THE U.S. SUPREME COURT'S HOLDING IN LEOCAL V. ASHCROFT, 543 U.S. 1, 73 U.S.L.W. 4001 (2004), THAT 18 U.S.C. §16's DEFINITION OF "CRIME OF VIOLENCE" - WHICH DIFFERS FROM SECTION 924(e)'s DEFINITION OF "VIOLENT FELONY" CANNOT ENCOMPASS MERELY NEGLIGENT CONDUCT SUCH AS DRUNKEN DRIVING.

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ARGUMENT

CRIMINAL LAW 05-294 NORTH CAROLINA V. SPEIGHT (N.C., 359 N.C. 602, 614 S.E. 2d 262)[M]; THIS COURT'S HOLDING IN STATE V. ALLEN, 77 CRIM. L. REP. 446 (N.C. JULY 1, 2005) THAT ERRORS OF TYPE CONDEMNED IN BLAKELY V. WASHINGTON, 542 U.S. 296, 72 U.S.L.W. 4546 (2004) ARISING UNDER NORTH CAROLINA'S STRUCTURED SENTENCING ACT, ARE STRUCTURAL AND THEREFORE, REVERSIBLE PER SE, APPLIES TO ALL CASES IN WHICH DEFENDANT IS CONSTITUTIONALLY ENTITLED TO JURY TRIAL AND SENTENCE WAS INCREASED BEYOND PRESUMPTIVE RANGE ON BASIS OF AGGRAVATING FACTORS THAT WERE NOT SUBMITTED TO JURY.; CODE CIV. PROC. §2033.280 AS ADDED IN 2004 PROVIDES IN PART: THAT THE PARTY REQUESTING ADMISSIONS MAY MOVE FOR AN ORDER THAT THE GENUINENESS OF ANY DOCUMENT AND THE TRUTH OF ANY MATTERS SPECIFIED IN THE REQUESTS BE DEEMED ADMITTED AS WELL.; 28 U.S.C. § 2254 (e)(2) - U.S. V. VALENZUELA-BERNAL, 458 U.S. 858, 102 S. CT. 3440, 73 L.Ed.2d 1193 (1982) SEE WIGGINS V. SMITH (2003) 539 U.S. 510, 123 S. CT. 2527, 2536, 156 L. Ed. 471, 486 [FAILURE BY DEFENSE COUNSEL TO INVESTIGATE AND DISCOVER AND PRESENT EVIDENCE IN MITIGATION OF PENALTY PRE-JUDICIAL.
SEE CHAMBERS V. MISSISSIPI 410 U.S. 284, 294-95, 93 S.CT. 1038, 1045-46, 35 L.Ed 297 (1973)

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IN LIGHT OF U.S. V. BOOKER 543 U.S. 220, 125 S.CT. 738, 160 L. Ed. 2d 621 (2005) - FEDERAL SENTENCING GUIDE LINES ARE SUBJECT TO JURY TRIAL REQUIREMENTS OF THE SIXTH AMENDMENT AND JUSTICE BREWER HELD FURTHER THAT 6TH AMENDMENT REQUIREMENTS THAT JURY FIND CERTAIN SENTENCING FACTS WAS INCOMPATABLE WITH FEDERAL SENTENCING ACT. THUS REQUIRING OF ACTS PROVISIONS MAKING GUIDELINES MANDATORY AND SETTING FORTH STANDARD OF REVIEW.

THE UNITED STATES SUPREME COURT HAS EMHASIZED THAT EVEN AFTER AEDPA, FEDERAL COURTS HAVE AN INDEPENDENT RESPONSIBILITY TO INTERPRET FEDERAL LAW - WILLIAMS V. TAYLOR (2000) 529 U.S. 362 [120 S.Ct. 1495; 146 L.Ed.2d 389]. COA STANDARDS: SEE MILLER-EL V. COCKRELL, 537 U.S. 322, 123 S.Ct. 1029 (U.S. 2003); SLACK V. MCDANIEL, 529 U.S. 473 (2000); 28 U.S.C. § 2235 (c) EXCEPTIONS TO EXHAUSTION REQUIREMENT: THERE ARE NO INTERVENING U.S. SUPREME COURT DECISIONS ON POINT OR OTHER INDICATIONS THAT THE STATE COURT WILL CHANGE IT'S OPINION, SEE SWEET V. CUPP (9TH CIR. 1981) 640 F.2d 233, 236, SEE ALSO GARDNER V. PITCHESS, (9TH CIR. 1984) 731 F.3d 637.

A HABEAS PETITIONER SHOULD RECEIVE AN EVIDENTIARY HEARING IF HE MAKES "A GOOD FAITH ALLEGATION THAT WOULD IF TRUE, ENTITLE HIM TO EQUITABLE TOLLING - SEE LAWS V. LAMARQUE, 351 F.3d 919 (9TH CIR. 2003); SEE ROY V. LAMPERT, 465 F.3d 964 (9TH CIR 2006) - PETITIONER'S WERE ENTITLED TO EVIDENTIARY HEARING TO RESOLVE THE CONFLICTS.

REQUEST JURY TRIAL 18 U.S.C. § 3691.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. FEDERALLY GUARANTEED FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSES, 28 U.S.C. § 2254; 28 U.S.C § 2244(b) NEW EVIDENCE 28 U.S.C. § 2253(c) 18 U.S.C § 401(1) "IN THE VICINITY OF THE COURT. RULES 15(a) AND 19(a) FED. R. CIV. P.; FOMAN V. DAVIS 371 U.S. 178, 182 (1962)

JURISDICTIONAL STATEMENT THE DISTRICT COURT So. CA., AND THE NINTH CIRCUIT COURT OF APPEALS OF THE U.S. HAS THE BROAD AND VAST POWERS TO REVERSE THE INCORRECT PROCEDURAL RULING OF THE U.S. DISTRICT COURT FOR THE SOUTHERN CALIFORNIA DISTRICT, AND HAS THE POWER AND JURISDICTION TO REMAND THE CASE FOR FURTHER PROCEEDINGS, INCLUDING, AN EVIDENTIARY HEARING, AND RECOMMENDATION OF AN ISSUE OF A PEREMPTORY WRIT OF FEDERAL HABEAS CORPUS RELIEF FROM AN UNCONSTITUTIONAL CONVICTION AND SENTENCING. THE NINTH CIRCUIT COURT OF APPEALS HAS THE BROAD POWERS TO DO WHATEVER IT WILLS OF ITSELF IN THE FAIR ADMINISTRATION OF JUSTICE. - U.S. SUPREME COURT HAS JURISDICTION TO REVIEW DECISION SEE. E.G. LONG, SUPRA AT 1038, N.4., 103 S.CT. 3469 ("WE MAY REVIEW A STATE CASE DECIDED ON A FEDERAL GROUND EVEN IF IT IS CLEAR THAT THERE WAS AN AVAILABLE STATE GROUND FOR DECISION ON WHICH THE STATE COURT COULD PROPERLY HAVE RELIED" (CITING BEECHER V. ALABAMA, 389 U.S. 35, 37. N. 3, 88 S.CT. 189, 19 L.ED. 2d (1967) (PER CURIAM))).

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EXHIBIT COVER PAGE

A
EXHIBIT

Description of this Exhibit: POST TRIAL ORDER DENYING DISCOVERY EXHIBIT "A"

Number of pages to this Exhibit: 1 pages.

JURISDICTION: (Check only one)

- ☐ Municipal Court
- ☐ Superior Court
- ☐ Appellate Court
- ☐ State Supreme Court
- ☒ United States District Court SOUTHERN DISTRICT OF CALIFORNIA
- ☐ State Circuit Court
- ☐ United States Supreme Court
- ☐ Grand Jury

MR E.W. BURTON #F02720 IN PROPER
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EXHIBIT A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

- ☐ COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101-3814
- ☐ HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827
- ☐ FAMILY COURT, 1555 6TH AVE, SAN DIEGO, CA 92101-3294
- ☐ MADGE BRADLEY BLDG., 1409 4TH AVE., SAN DIEGO, CA 92101-3105
- ☐ KEARNY MESA BRANCH, 8950 CLAIREMONT MESA BLVD., SAN DIEGO, CA 92123-1187
- ☒ NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92083-6643
- ☐ EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941
- ☐ RAMONA BRANCH, 1428 MONTECITO RD., RAMONA, CA 92065-5200
- ☐ SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910-5649
- ☐ JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792
- ☐ JUVENILE COURT, 325 S. MELROSE DR., VISTA, CA 92083-6634

FOR COURT USE ONLY

F I L E D
Clerk of the Superior Court

JUL 1 8 2007

By: M. AGUILAR, Deputy

PLAINTIFF(S)/PETITIONER(S)
THE PEOPLE OF THE STATE OF CALIFORNIA

DEFENDANT(S)/RESPONDENT(S)
ERIC WILTON BURTON

JUDGE: H. J. EXARHOS
DEPT: 11

CASE NUMBER
SCE238643

CLERK'S CERTIFICATE OF SERVICE BY MAIL
(CCP 1013a(4))

I, certify that: I am not a party to the above-entitled case; that on the date shown below, I served the following document(s): ORDER DENYING MOTION FOR DISCOVERY PURSUANT TO PENAL CODE 1054.9

on the parties shown below by placing a true copy in a separate envelope, addressed as shown below; each envelope was then sealed and, with postage thereon fully prepaid, deposited in the United States Postal Service at: ☐ San Diego ☐ Vista ☒ El Cajon ☐ Chula Vista ☐ Ramona, California.

NAME & ADDRESS

ERIC W. BURTON, F-02720
CORCORAN STATE PRISON SP-C1-132L
P.O. BOX 5246
CORCORAN, CA 93212-5246

NAME & ADDRESS

SAN DIEGO DISTRICT ATTORNEY
250 E. MAIN ST
EL CAJON, CA 92020
VIA: INTER-OFFICER MAIL

CLERK OF THE SUPERIOR COURT

Date: July 18, 2007 by _____, Deputy
M. Aguilar

MR. ERIC W. BURTON #F07720
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EXHIBIT

A

MR. E. W. BURTON #F02730
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CERTIFICATE OF SERVICE

28 U.S.C. § 1746

Case Name: ERIC WILTON BURTON v. DIRECTOR OF THE C.D.C.R.

Case No.: 08-325 LAB (POR)

IMPORTANT: You must send a copy of ALL documents filed with the court and any attachments to counsel for ALL parties in this case. You must also file a certificate of service with this court telling us that you have done so. You may use this certificate of service as a master copy, and fill in the title of the document you are filing. Please list below the names and addresses of the parties who were sent a copy of your document and the dates on which they were served. Be sure to sign the statement below. You must attach a copy of the certificate of service to each of the copies and the copy you file with the court.

I certify that a copy of the 1ST AMENDED PETITION & MEMORANDUM OF POINTS (ATTACHED) AND AUTHORITIES (SEPARATE) (Name of document you are filing (i.e., opening brief, motion, etc.) EXHIBITS A + MOTION (BRADY V. MARYLAND) PRETRIAL DISCOVERY MOTION POST-TRIAL DENIAL

and any attachments was served, either in person or by mail, on the persons listed below.

REQUEST COURT TO GIVE NOTICE TO THE RESPONDENT AND ATTORNEY GENERAL AND ALL OTHER PARTIES INVOLVED IN THE INSTANT ACTION.

_____
Signature
Notary NOT required

Name	Address	Date Served
U.S. DISTRICT CT. C.A. SOUTHERN DISTRICT	880 FRONT STREET S.D. CA 92101	6-15-08